YOUR NAME Elmer R. Bautista
YOUR ADDRESS P.O. Box 3471-3C02-102
YOUR TELEPHONE NUMBER

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA
(Must start on line 8 or below)

Elmer R. Bautista
Petitioner

-v-

D. Adam

Respondent

Case No. '08 CV 0495 JAH BLM
(To be assigned at time of filing)

COMPLAINT FOR (Brief description of document)

Plaintiff alleges:

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INTRODUCTION

In these consolidated appeals, Elmer Rafael Bautista appeals from (1) a judgement of Conviction of Commercial burglaries, Kidnap, robbery, and related Counts arising out of the robberies at two restaurants a Taco Bell and an EL Pollo Loco (No. B-123331) and (2) from a posttrial order imposing a restitution fine of $41,000 (No. B-174565). The Court sentenced Petitioner a taxi driver by profession (2 C.T. 287) to a determinate sentence plus two consecutive Life terms.

Petitioner Bautista was tried with Codefendant, Antonio Moran. The primary Joint defense to the Taco Bell offenses was that one of the "Complainants, Janette A. was an accomplice and not a victim." (7RT 1829.) Taco Bell's Loss prevention "manager sent a fax (BB) to the Glendale Police Department stating that he had received information that victim Janette A might have been a participant in the burglary," although he retracted that suspicion at trial. (Compare 7-RT 2172 with 7RT 2175.) Bautista's individual defense was that he was involved only in two Commercial burglaries, i.e., Taco Bell and an ATM machine (4 RT 72.) Bautista's defense to the EL Pollo Loco burglary and related offenses was misidentification (4 RT 73).

Petitioner Bautista's Conviction should be reversed because:

(1)

The Court violated Petitioner's Constitutional rights under (Miranda) by addmitting his post-arrest statements regarding the Taco Bell burglary which was taken without asking Bautista if he gave up his right to remain silent

(2)

Compounding the (Miranda) error, the Court admitted a redacted version of Bautista's statement which eliminated all exonerating material, thus casting the mayor onus of the Crimes on Bautista.

(3)

Further aggravating the error, the Court permitted the prosector to use the redacted version of Bautista Statement to argue falsely that he did not identify others involved in the Taco Bell affair.

(4)

The erroneous admission of hearsay in the guise of spontaneous statements deprived Petitioner of a fair trial and due process Violation of 14 Amendant

(5)

The convictions related to the EL Pollo Loco incident, Counts 8, 9, and 10 are not supported by sufficient evidence

(6)

Instructional errors deprived Petitioner of a fair trial and due process.

(7)

Cumulative error in this Case case deprived Petitioner of a fair trial and Constituted a miscarriage of Justice.

(8)

The post-Judgment restitution order which is the subject of the second appeal should also be reversed because the trial Court erred in imposing a $41,000 restitution fine when the victim's net Loss was at most, $11,000.

Statement of the Case

Counts for Offense

(1) 209(b)(1) Kidnap (of Martinez) to commit robbery;

(2) 209(b)(1) Kidnap (of Martinez) to Commit robbery from Automated Teller Machine;

(3) Charged against Codefendant Moran only;

(4) 288(a)(c)(2), Oral Copulation (Janette A);

(5) 211 Second degree burglary of Taco Bell;

(6) 211 second degree burglary of (Martinez at Taco Bell);

(7) 211 Second degree robbery (of $10 from Martinez's wallet);

(8) 211 second degree burglary (of El Pollo Loco);

(9) 211 second degree robbery (of Black);

(10) 211 second degree robbery (of Estrada);

(11) 209(b)(1) Kidnap (of Janette A.) to Commit robbery;

(12) Charged against Codefendant Moran only; dismissed;

(13) Dismissed (13 RT 5483)

(14) 209(b)(1) Kidnap (of Janette A.) to Commit rape;

Personal use and principal armed allegations accompanied all Counts (2-CT 338, 348, 358.) Petitioner pled not guilty and denied the allegations. 6CT 359) We also demurred to the section 12022.53,

Petitioner was tried with Codefendant, Antonio "Paco" Moran, who was not charged with all the same Counts. A third participant Gullermino "Meno" Sandoval, was not apprehended (see 2-RT D-14; 3 RT 012-015.) subdivision (b), allegation in Count 5 and 8 (2-CT 359; 4-RT 43.) The Court sustained the demurrer. (2 CT 365; 4-RT 303.)

Trial by Jury Commenced on March 10-2003. (1-CT 232.) This was quickly followed by a motion for mistrial based on prosecutorial misconduct during voir dire- a harbinger of what was to Come. In the presence of potential Jurors, the prosecutor stated that this was a Life case. Jurors are not supposed to Know about punishment. (Aug. RT 4.) The defense moved for a mistrial based upon the prosecutor's improper Comment. The Court denied the motion. (2 CT 297-298; Aug. 4.)

The prosecutor and defense Counsel made opening statements on April 2-2003. (2-CT-360.) All sides rested on April-28-2003 (13 RT 5441.) Court and Counsel Conferred regarding Jury instructions on April 28, 29, 30, May 1, 2, 5. (2 CT 445 450 454 458 463 466 13 RT 5484.) Arguments began on May 1, 2003 before the Court finalized the instructions or prepared the verdict forms. (14 R.T. 6623.) Defendants moved unsuccessfully twice for a mistrial based on misrepresentations the prosecutor made during closing argument. (2-CT-474-482).

Petitioner moved for a new trial for prosecutorial misconduct, instructional error, Judicial misconduct. (4-RT-910.) This motion was heard by a judge who had not presided over the trial. (See 3-CT 778; 19 RT 11401.) The Court denied the new Trial motion. (4-CT 916.)

The Court sentenced Petitioner to 26 years, eight months plus two Consecutive Life terms with possibility of parole on Count I. and II, the section 209 subdivision (b) (1), offenses. (4-CT-916-922; 19 RT 11490-11498.)

The court imposed a restitution fine pursuant to section 1202.4 subdivision (b), in the amount of $4,400, and a parole restitution fine pursuant to section 1202.45 in the amount of $4,400 stayed. (4-CT-922; 19RT-11529.) The court further imposed a $20.00 Court security Charge pursuant to Government Code Section 69926, subdivision (a), a $10.00 Crime prevention fine pursuant to section 1202.5, and a $20.00 fine pursuant to section 288, subdivision (m). (4-CT924; 19RT 11505-11506, 11529.) Petitioner was given 1090 days of precommitment Credits (4-CT 932; 19RT 11532.) The court order a restitution hearing (19RT 11534)

Restitution Hearing:

(Janette A.) elected not to seek restitution. The court held a hearing with respects to restitution for (Pedro Martinez) pursuant to section 1202.4.[2] (CT65 RT 1) The Court awarded $10,160 for doctor's Care, $4,934.34 for medication, and $26,000 for Lost wages, for a total of $41,094.34. The restitution order was Joint and several (RT29.)

TAKE NOTICE

The name on his medical record is "Pedro Romero" RATHER than "Pedro Martinez" (see CT 69) Apparently he uses the name "Pedro Romero Martinez" (see RT 3)

Statement of Appealability

Appeal NO. B173331; The Court sentenced Petitioner on February 5-2004. (4-CT 916) The abstract of Judgment was Filed on March 3-2004.

Petitioner filed a timely notice of appeal from the Judgment of February 5, 2004 (4-CT 947; Cal. Rules of Court, rule 30.1.) This Court has Jurisdiction pursuant to section 1237 subdivision (a)

Appeal No. B174565: The court held a restitution hearing on April 1-2004 (RT 347.) Petitioner filed a timely notice of appeal on April 8-2004 (RT 342; Cal. Rules of Court, rule 30.1.) This Court has Jurisdiction pursuant to section 1237, subdivision (b).

Notice of Joinder

Petitioner Bautista hereby Joins in the briefs filed by Co-defendant Antonio Moran and adopts all of his arguments which may accrue to Petitioner Bautista Benefit. (Cal. Rules of Court rule 13 People v Stone (1981) 117 Cal. App. 3d 15, 19. fn. 5; People v Smith (1970) 4 Cal. App. 3d 41, 44.)

Statement of the Facts

Counts 1-2-4-5-6-7-11-12-13-14

July 2-2001 Taco Bell Burglary and related Charges

(A)

The Taco Bell Incident:

Pedro Martinez was the shift manager for a Taco Bell Store in Glendale. (4-RT 82-83) The Taco Bell had a time-clock safe. It could only be open from 8:00 in the morning until 10:00 at night (4 RT 88.)

(B)

On July 2-2001, the restaurant closed to the public at 2:00 a.m., but Martinez and three other employees (Wayk, Fernando, Janette A.) remained to clean the store because a company inspection was scheduled for the next day. (4 RT 83-85.) They worked until 3:00 A.M. Martinez who customarily drove Janette to her home about three blocks from Martinez's home when she worked late at night left with Janette in his own brown Honda. Wayk got a ride home with Fernando (4-RT 94-95); (5 RT 633 705-706, 919.) while driving north on Central Avenue in Glendale, Martinez realized he had a flat tire on the right rear passenger side. There was a slash in the tire. He pulled into the brightly illuminated parking lot of a shopping center to change the tire (4-RT 97-98 102; 5 RT 920, 922.)

(C)

Martinez started to change the tire. Janette stood nearby examining the flat tire and talking to him. He had completely changed the tire, although the car was still on the jack, when Petitioner Bautista approached (4-RT 98 99 5-RT 924 926 927) Petitioner was wearing a T-shirt and a baseball hat. (5-RT 977.) Janette told Martinez that Bautista had a gun (4-RT- 100-101-333) In spanish Petitioner told the two to get into the rear seat of Martinez' car or he shot. (4-RT-103.) They complied. Petitioner bound Martinez's "hands in front of him with sticky tape and taped Janette's hands together on the top of her head." (4-RT-323-324-; 5-RT 677, 929-930) "He got then into Martinez's brown Honda and drove of the jack and out of the parking lot." (4-RT-104-105) A blue Chevorolet followed them (4-RT-105).... And he did this all by himself while "Mino & Paco" Just watched and Janette and Martinez not once said or question any of Petitioner Bautista's orders they Just went and got into the car. They open the door step into the rear seat and wait for Bautista to come and bound their hands Martinez's hands in front where if he need to strike Bautista he Could. and Janette he bound her hands together on top of her head. for whatever his reason where ("PLEASE") and now a blue Chevrolet is following them.

(D)

Both cars stopped on winder street, the brown Honda behind the blue Chevrolet. Unlike the parking Lot where Martinez Changed the tire, there was no nearby Lighting and no traffic on winder (4 RT-107-109) Petitioner took Martinez out of his Honda and entered the back seat where he fondled Janette and insisted that she kiss him or he would shoot her. (5-RT-931-933) Petitioner Left the Honda, untied Martinez, and directed him to the front passenger seat of the blue Chevrolet stating they were going to the store to get the money. Martinez tired to Tell him about the safe, but Petitioner Just wouldn't Listen. Bautista told Martinez that if he would not Cooperate, Petitioner would Shoot him a dump him in the Angeles Crest Mountains. (4-RT-322-325-; 5-RT-678-681)

(E)

Defendant Moran who had been in the blue Chevrolet got into Martinez's Honda (4-RT 341; 5-RT-935.) He was wearing a jacket and a blue fishing style hat (5-RT-928 (Ex. 16 [blue fisherman's hat].) Janette saw another person in the area, wearing a red shirt. But She could not see his face and he did not approach her (5-RT 941) Moran told Janette to bend over and pull her pants down. She Said She Could not because She was having her period. Moran pulled down her pants and sodomized her. (5-RT-936-937)

(F)

Meanwhile Petitioner drove Martinez to the Taco Bell. The gun was placed in the space between the two front seat (4 RT-330-335-336.) On the way, a patrol car passed by. Petitioner told Martinez that if they were stopped by the police, Martinez was to say he and Petitioner were friends, and Petitioner was taking Martinez home. (4 RT 331.) They were stopped by a sole officer in a patrol car. (4 RT 332, 336.) Petitioner made a cell phone call, stating they were being stopped by police and if the party to whom he was speaking did not hear from Petitioner in 15 Minutes, he knew what to do. (4 RT 333.) When the officer approached and ask the Petitioner where they were going, Petitioner told him they were going to Martinez' house. Petitioner told the officer he did not have a driver's License or the registration with him. Then the officer explained the reason for the stop was because the License plate was not showing. The officer let them go. (4 RT 338.)

(G)

Petitioner returned to windsor street and told the person inside the Honda that everything was okay and they were to proceed with the plan. (4 RT 339.) Petitioner drove Martinez to the Taco Bell (4 RT 342.) Martinez disconnect the alarm and showed Petitioner the safe. (4RT-343) When Martinez explained the safe would not open, Petitioner punched him. (4RT-354) Martinez then took $75.00 from each of the three Cash registers and put the money into a plastic bag with the Taco Bell Logo on it. On demand Martinez took the $10 bill he had in his wallet and gave that to the Petitioner who put it into the Taco Bell bag with the rest of the money (4 RT-355-358).

The store had two digital Video Cameras as part of a close circuit television system (7 RT 2153-2154.) Petitioner put the videotape from the digital Video Camera in the bag with the money. (4 RT 361-362; 5 RT 692) Petitioner's photo was taken during the burglary.[3] (8 RT 2751.)

(H)

Petitioner phoned someone, said Martinez did not want to Cooperate, and asked, "What do you want me to do with him?" (4 RT 359.) In response Martinez said he would go with Petitioner to the bank and get him money. Petitioner relayed this information to whomever he was Calling. (4 RT-359-361.) They went back to the bank. Martinez Left the Car, took $300 out of the ATM and returned to the blue Chevrolet by walking behind it to Look at the License number. (4 RT 388-389.) He got into the Car, gave the Money and the withdrawal slip to Petitioner who placed both in the Taco Bell bag with the rest of the money. (4 RT-362-363-370.) On the route from the bank back to Winder Street Petitioner pointed out Martinez [redacted] house and the house where Janette A. Lived. (4 RT 363.)

(I)

Unbeknownst to the burglar, there is a disk in the Camera which enables the images to be downloaded to a Computer. This allowed the investigators to obtain photos of the persons in the store between 3:00 and 4:00 a.m. on July 2-2001 (6 RT-2154-2155-2158-2159-; 8-RT 2749-2750; Exs 14-15)

(J)

Petitioner returned to Winder and parked in front of Martinez' brown Honda. Petitioner and Moran switched places, Petitioner going to Martinez Honda and Moran getting into the blue Chevrolet where Martinez remained. (4 RT 365-366.) Petitioner Bautista asked Janette if Moran did something to her. She did not respond. (5RT-942.) Then Petitioner told her to pull down her pants. She said she could not because she was having her period and because her hands were taped above her head. Petitioner ripped the tape with his mouth pulling out some hair from Janette's head. Petitioner forced Janette to orally copulate him. (5RT 943.) Petitioner got out of the car. (5RT 946.)

(K)

Meanwhile, defendant Moran kept asking Martinez about valuable thing in the Taco Bell, who made deposits and when. Moran told Martinez they would let him go, and when he made a police report, he was to blame it on black people. (4RT 368; 5RT 987.) Martinez was to wait 45 minutes or maybe 15 minutes before leaving. (Compare 4RT 383 with 5RT 990.) The two men took off in the blue Chevrolet. Martinez moved to the driver's side of his brown Honda and waited about 15 minutes until the crying Janette asked him to drive her home. Janette told her mother part of what had happened. Janet and Martinez called Taco Bell Managers and then the police (4RT 385-386; RT 1321.)

(L)

Officer arrived and took report (4RT-382) Martinez told them what had taken place, but at first did not tell them about the blue Chevrolet's license number (4RT-388) Later that day Martinez gave the Police what he recalled of the license plate numbers the first three (4NQ) and the last three 713.) (5RT 610.) Janette was taken to a hospital where a nurse practitioner conducted a sexual assault examination and concluded that her findings were consistent with either forcible or consensual sodomy. (5RT-992; 9-RT-3317; 11-RT-4224, 4249.)

(M)

Janette was a good friend and neighbor, Karla Campos whose boyfriend is Guillermino "Meno" Sandoval, the third man involved in the robberies, but not apprehended. (5-RT 984, 1005, 1031; 2CT-283.) Janette also knows Lidia Batres, Meno's sister, and their brother, Carlos. Another of Janette's friend is Karina, whose boyfriend is Carlos. Janette had never seen appellant or Moran with these friends (5RT 985, 1013, 1031.) She denied ever hearing Carlos or Meno or anyone else talk about robbing The Taco Bell restaurant. She denied telling them about the time-lock safe. The subject of the restaurant came up only because Meno and Carlos wanted to work there (5 RT-1001; 6 RT 1225 1323.) Janette denied knowing that codefendant Moran was related to her friends (6 RT 1234-1235)

(N.)

Nonetheless two weeks before the Taco Bell Burglary, Lidia Batres, Meno's sister, called Janette and threatened her, "Take care of your back." But maybe it was not Ms Bates calling. (Compare 5-RT-1018, 1022, with 6-RT-1240.) Janette reported the threat to the Investigating officer. (5-RT-1023, 1049.) Two weeks after the Taco Bell incident, Meno called Janette's mother and told her to stop making accusations about a robbery. (5-RT-1024.) Another call came from Bates. (5-RT-1024-1025.) Janette may or may not have told the police the identity of the persons making these calls (5-RT-1025, 1027.)

The Investigation of the Taco Bell Incident:

At 3:48 A.M. on July 2-2001 Glendale Police Officer Mendoza made a traffic stop of a blue Chevrolet on Windsor Street and Columbus Avenue because it did not have a visible rear License plate (6RT 1562-1563, 1562.) There were two people in the vehicle; Petitioner Bautista was driving (6 RT 1564.) The passenger was wearing a Taco Bell uniform and hat. He told the officer that the driver had Just picked him up from work and was driving him home. Petitioner explained that he had gotten gas and forgotten to flip the License plate back up.[4] (RT-6)-1569-1570-1572.) Although Petitioner did not have his driver's License with him, he was able to give the officer his License numbers and his License plates. The computer system for running License numbers and License number for plates was not working so the officer ended the stop and told Petitioner to drive safely. Petitioner got out of the car and folded the License plate up (6-RT-1572-1574-1577.)

The same officer responded to Janette's house following a 5:09 a.m. radio call of a robbery, Kidnap, and rape investigation. (6-RT-1575.) The officer recognized Martinez as the passenger in the car he had stopped. (6-RT-1578.) Janette told him she worked at Taco Bell, the restaurant had been robbed, and she had been raped. (6 RT-1579; 7 RT 1837.)

[4] This was an older Chevrolet which has the gas cap behind the License plate. The plate has to be flipped down before fuel can be pumped (7-RT-1851.)

The detective took Janette to a hospital for examination. (7RT 1932, 2107.) The detective took the assault evidence and booked it into a Locked, secured Lab freezer. Later, the evidence was sent to the Los Angeles County Sheriff Department's Scientific Services Bureau. (7-RT 1931) D.N.A. Samples were taken of petitioner and defendant Moran. (8-RT-2434-2435.) The DNA expert "excluded Petitioner Bautista" as the semen doner. "But found a match to Moran" (1 in 472 Trillion unrelated Males.) (8-RT-2726) yet Bautista was blamed and Convicted on a Crime he never Commit.

Through a partial plate number provided by Pedro Martinez, an officer ran through the D.M.V. Computer various versions of the number, cross-checking for a vehicle matching the physical description of the Chevrolet. It matched a 1993 Chevrolet Caprice Classic, No. 4NQZ713 (7RT-1855-1857.)

L.A.P.D. officer Schlegel Learned during the July 4th roll-call to be on the Look out of a blue Chevrolet Caprice (7-RT-1864-1865.) He and his partner spotted the Vehicle with two occupants, Petitioner and a women. (7-RT-1865-1866.) They stopped the occupants without incident, detained and transported them to the Rampart station, and notified the Glendale Police Department. (7-RT-1868-1869.) L.A.P.D. officer Flores is a Spanish-speaking officer assigned to Rampart. Around 9:00 or 10:00 P.M. Flores Mirandized and translated the interrogation of Petitioner by Glendale detectives Currie and Frank. (7RT-1823-1826; 8-RT-2531-2532; 9-RT-3017.) Petitioner agreed to speak to the officers without an attorney present, but was not asked if he gave up his right to remain silent. (7-RT-1827; 9-RT-3005.) Pursuant to interrogation Petitioner said that the Chevrolet Caprice belonged to him, that he was at Taco Bell on July 2 in the Caprice, that he followed a gray Honda as it left Taco Bell and stopped in a parking Lot, that a male and Janette were fixing a tire (Notice how everyone Knows Janette even from a far distant whether it be Day or Night even in bad Lighting) Any after the tire was fix that Petitioner moved the Honda with the male and Janette in it that he drove the Male back to Taco Bell and thence to the bank where a withdrawal was made in the Chevrolet. And that he was paid $40. as the result of "what went on." (9RT-3006-3009.) Petitioner denied being armed with a handgun, and denied that he sexually assaulted Janette (9RT 3018.)

Officer McLaughlin participated in the search of a rear house on Third Avenue in Los Angeles, and a Toyota 4-Runner on July 5-2001. He recovered a fishing-type cap with the words "Chicken Run" on it in the 4-Runner and turned it over to another officer for booking into evidence. (7-RT-1897-1899; (R T-13) 5438.) Documents found inside the vehicle were in defendant Moran's name (15-RT-5438.)

Detective Currie also participated in the search. (8-RT-2532) Four Cell Phone were recovered. (9RT-3012.) "NO guns were found" (9RT-3027) Currie identified defendant Moran as the person arrested following the search. (8 RT-2533.) Currie also put a phone trap on Janette's phone.[5] Two weeks after July 2, Janette paged Currie, he called and Learned that her mother had received a threatening or intimidating call. (9-RT-3031.) The mother told Currie that the Caller

A phone Trap is an electronic Tracking device that allows the Phone Company to see who Called a particular number (9RT-3030)

identified herself as the sister of the boyfriend of Karla Campos (9RT-3035.) Currie traced the number through the phone trap and Confronted Ruth Sandoval and Lidia Batres. The threatening caller was Lidia Batres. Janette had not told Currie that she Knew Lidia Batres (9RT-3035-3036-3054.)

Eventually, Janette addmitted to Currie that she Knew "Meno" was Karla's boyfriend and that Janette had been in Meno's automobile two weeks before July 2-2001 and that she had suggested to Meno's brother Carlos Sandoval, a Long-standing employee of the Toe Bang Restaurant, that he apply for a job at Taco Bell. (9-RT-3038-3040-3045.) However Janette never told the officer of her Connections to Lidia Batres and defendant Moran (9-RT-3048.) Then during Jury selection Carlos Sandoval made a threatening Call to Janette on behalf of defendant Moran's wife (Sandoval's sister-in-Law) (9RT-3056.)

Currie prepared a photo six-pack for Janette to veiw (8-RT-2538) She identified Petitioner as the man who first approached her and Martinez in the parking Lot. (8-RT-2732 9-RT-3021; Ex 35) She identified defendant Moran in another six-pack as the person who was with Petitioner (8RT 2834; RT 3027 Ex 35.)

On December 31-2001, Martinez viewed a Live Lineup. He indentified No. 3 (4RT-395.) He was not able to make an indentification in a photo Lineup. (4-RT-392.) Martinez recognized Petitioner in frames reproduced from images Captured on the Taco Bell surveillance Cameras' hard drive. (4 RT 401,404; 5RT-608-609.) He identified Petitioner in Court. Janette indentified Petitioner and codefendant Moran in court. (5-RT-935-982.) She indentified Petitioner and Moran in the Live Lineup (5-RT-995-999.)

Pauline Villescas is a fraud investigator for the bank of America (7-RT-1879.) She testified that a $300 Cash withdrawal was made on July 2 at 4:07 a.m. from Pedro Romero Martinez' account at the A.T.M. machine on San Fernando Road. (7-RT-1883-1885.)

Defendant Moran's fingerprints and thumb prints were found on Petitioner's blue Chevrolet and on Martinez' brown Honda. Petitioner's prints were found on his Chevrolet (7-RT-2226-2229-2230; 8-RT-2413-2426-2428.) Petitioner's fingerprint was also discovered on a group of Taco Bell bags in the restaurant. (7-RT-2229-2230; Ex 9; 8-RT-2430.)

Counts 8, 9, 10.

The June 18-2001 El Pollo Loco Burglary and Related Charges

(The El Pollo Loco Burglary.) On June 18-2001 about 12:20 a.m. Laura Black the general manager of the El Pollo Loco on South Central Avenue in Glendale, was in the restaurant office preparing a food cost report for inventory. Ivan Estrada, a manager, was counting money for the nightly deposit. There was $1100 in the safe, which was open. The restaurant had not been secured because the cleanup person was taking trash out the back door (11RT 4269-4272.) As Black prepared to leave, defendant Moran came through the door behind employee Carlos Francisco, raised a black and silver semiautomatic to her face, ordered Black not to look at him, and pushed her back into the office (11RT 4276-4277, 4283.)

According to Estrada the man with the gun was wearing a blue fishman's hat that said "Chicken Run" on it. He order Estrada to turn around and get to the floor. (11RT 4563, 4566, (Ex. 16) He tore the phone cord off the fax machine, tied Estrada's hands hand behind his back, and push him on the ground. He pushed Black into a corner. (11RT 4280, 4564-4565) Then he pickup Estrada's black backpack, emptied it, took the $2800 that Estrada had been counting and put it in the back pack. He also took $1100 out of the open safe, (11RT 4277-4278, 4564.)

The cook Martin Oros saw the man enter right behind Francisco. He was wearing a blue Cap with "Roast Chicken" on it. Oros did not see a gun. (11RT 4311, 4313, 4515.)

Meanwhile, Nancy Salangsang was cleaning up when she noticed a man walking back and forth outside the front door. (11RT 4576.) This man was heavyset with a big stomach, wearing a Cap and smoking (12RT 4830.) As Salangsang went towards the Kitchen to put away a broom and mop, a man inside the restaurant grabbed her, pressed a gun into her back and pushed her into the Kitchen and then into a back office. (11RT 4578, 4580;) 12RT 5108.) The same man gestured to Oros to go into the Kitchen where Carlos Francisco and Nancy Salangsang had already been tie up. Oros was tied up (11RT 4308-4310;) 12RT 4804-4805.)

Salangsang saw the man with the "Chichen Run" hat Come out of the office with Estrada's backpack. (11RT 4583-4584; Ex. 16.) He Came to the door and said "Vamos." The man who tied up Oros and Salangsang followed the man with Carrying Estrada's backpack out through the back door. (11RT 4585;) 12RT 4824-4832.) A man entered the office and said something in Spanish to the man with the gun. Someone told Black and Estrada to say put; the burglars Left. Ms Black went to the Kitchens to see if the other employees (Oros, Salangsang Francisco) were safe. She found them tied up with shoeLaces and apron strings (11RT 4282.)

The Investigation of the El Pollo Loco Burglary;

Patrol Officer Van Gorden responded to the El Pollo Loco. (12RT 5130-5131) He spoke to Martin Oros who told the office what happened and gave descriptions of two individuals. (12RT 5131-5133.) The individuals with the gun was a thin white man 5'6 or so black medium-Length hair, Clean shaven and wearing a black baseball Cap, a white and red Checkered shirt white pants and white tennis shoes (12RT 5139) The second man was a male Hispanic, no mustache, wearing a light blue baseball Cap and a white T-shirt. (12RT5139.) Oros Could not identify the second man because he never saw his face (12RT 5141).

Officer Hess also responded to the El Pollo Loco, and interviewed Nancy Salangsang. Salangsang told the officer that a man grabbed her by her shirt Collar. She described that person as a male Hispanic in his 30's 5'5" in height, with a thick mustache and a thin build. Salangsang discribed the weapon as a Chrome semiautomatic handgun with a black handle. (13RT 5422-5423.) Salangsang further Stated there was only one man in the restaurant. She described the second man outside the restaurant as a male Hispanic in his 30's 5'2" tall 160 pounds with a heavy build and a big stomach. (13RT 5424-5425.)

Argument

Ground #1 [redacted] Appeal from the Judgment, NO. B173331

The trial Court Violated Petitioner Bautista 5th and 14th amendment rights when it admitted his post-Arrest statement Taken without asking if he gave up his right to Remain silent.

Supporting Facts

The trial court improperly admitted evidence derived from Bautista's statement to police officers regarding the Taco Bell offenses in Violation of the rule adopted by the majority in (Miranda V. Arizona (1966) 384 U.S. 436, 444, 445. 86 S. Ct. 1602 16 L. Ed. 2d. 694. Because the Miranda advisement was inadequate - the officer did not ask Bautista if he gave up his right to remain silent - Petitioner's Convictions of the charges relating to the Taco Bell affair should be reversed for Violation of his Fifth and Fourteenth Amendment rights.

A. Standard and Scope of Review

This Court is bound to Petitioner writ and also This Court is bound by the Trial Court's resolution of disputed facts and inferences, and its evaluation of Credibility, if they are supported by substantial evidence. However, the Court also has a duty to independently determine from the undisputed facts and those pooperly found by the Superior Court whether the chellenged Confessions were illegally obtained. (People V. Ochoa (1998) 19 Cal. 4th 353-402) (People V. Bradford (1997) 14 Cal. 4th 1005-1032-1033.) The Court engages its independent review in the light of the record in its entirely, including all of the surrounding circumstances including the characteristics of the accused and the details of his encounter with police. (People V. Neal (2003) 31 Cal. 4th 63, 80.) The court applies federal standards in its review of a claim of a Miranda violation. (Id at p: 86 People V. Crittenden (1994) 9 Cal 4th 83, 129)[6]

B The officer never inquired as to whether Petitioner Bautista gave up his fifth Amendment right to remain Silent

In Miranda V. Arizona supa 384 U.S. 436) the Supreme Court held that under the fifth and fourteenth Amendments a suspect may not be subjected to custodial interrogation unless he knowingly and intelligently waives the right to remain silent, to the presence of an attorney, and to appointed counsel in the event that he is indigent. (Id at pp. 444-445, 473-474; People V Sims (1993) 5 Cal. 4th 405, 410.)[7] Statements obtained in violation of this rule are deemed involuntary and cannot be used to establish guilt. (Miranda, supra, 384 U.S. at p. 444.)

The distinction between involuntary statements and statements taken without a valid Miranda waiver is explained succinctly in (Moran V. Burbine (1986) 475 U.S. 412 421 106 S.Ct. 1135, 89 L.Ed. 2d 410.):

[6] (Cert. den. (1995) 516 U.S. 849, 116 S. Ct. 144, 133 L. Ed 2d 90.)

[7] (Cert. den. (1994) 512 U.S. 1253, 114, S. Ct. 2782, 129 L. Ed. 2d 893)

"First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived"

Before a Court can conclude that a defendant validly waived his Miranda rights, it must first find the defendant was aware of and understood its rights. [redacted] 451 U.S. 477 484, 101 S. Ct. 1880, 68 L. Ed 2d 378.) Courts must indulge every reasonable presumption against waiver of fundamental Constitutional rights. (Johnson V. Zerbst (1938) 304 U.S. 458 464 58 S. Ct. 1019 82 L. Ed. 1461.)

To ascertain whether a suspect understands his rights Police officers generally read from a Miranda card and then ask the defendant if he gives up each of those rights including, Do you wish to give up the right to remain silent? (See discussion infra at p. 24, fn 8.)

In contrast here the officer asked Petitioner if he understood his rights. He stated he did. The officer asked if Petitioner wanted to speak with an attorney. He said no. The officer asked only one other question - Did Petitioner want to have an attorney present during the questioning. Petitioner said no. (7RT 1877) The officer "NEVER" asked if Petitioner wanted to give up his right to remain silent. [8]

Hence, it is undisputed that the Miranda warnings officer Flores read to Petitioner were incomplete and inadequate. (8RT 2774) 2780.) The Court agreed that he was not asked this question but deemed it a "TINY DETAIL," to which Petitioner's Counsel responded that it was "NOT a TINY DETAIL" "It's actually one of the fundamental rights." (8 RT 2782.) Although the Court found the advisement were "SLOPPY," it figured that under the totality of the circumstances Petitioner understood that he had the right to remain silent, and waived that right voluntarily. The Court denied the motion for Mistrial. (8RT 2783-2785.) The Court erred.

8 The Los Angeles Police Department advises its officers to give the following admonition and ask the following questions:

"Admonition Rights"

when a suspect in custody is to be interrogated regarding his possible participation in the Commission of a criminal offense, he shall be "warned" exactly as follows:

1 you have the right to remain silent... (2) If you give up the right to remain silent, anything you say will be used against you in a Court of law... (3) you have the right to speak with an Attorney and to have the attorney present during questioning... (4) If you so desire and cannot afford one an Attorney will be appointed for you without charge before questioning.

aware of all of his rights, it was absolutely crucial for the officer to ask, "DO YOU GIVE UP THE RIGHT TO REMAIN SILENT?" Only then Could it be said that Petitioner Knowingly, intelligently, and voluntarily waived his Constitutional right to remain silent. Petitioner Conviction should be reversed because his involuntary statements were used against him in Violation of Miranda (9 RT 3006-3009.)

Human rights News (washington D.C. 4-23-04) (http//hrw.org/english/docs/2004/04/22 guatem 8485.htm.)

Adding the proverbial insult to injury, not only did the prosecutor use Petitioners Statements against him, she convinced the Court to redact all exonerating portions of the statement in order to protect codefendant Moran and defeat a Motion for severance. Then the prosecutor use the redacted version of Petitioner's statement to pillory him by arguing he never told the Police about others involved when in truth he did.

As Petitioner show next, this combination of events is a Constitutional Violation of Petitioner Fifth, sixth and Fourteenth Amendments Right which it requires Reversal, "After the admonition has been given, the following questions shall be asked.

(1) Do you understand each of these rights I have explained to you?. (2) Do you wish to give up the right to remain silent? (3) Do you wish to give up the right to speak to an attorney and have him present during questioning? (People v. Manis (1969) 268 Cal App. 2d 653, 668, fn. 4 emphasis added.) The right to remain silent and waived that right voluntarily, the Court denied this motion for mistrial (8 RT 2783-2285.) The Court erred.

C. Petitioner's Statement Should have been excluded Because under the Circumstances it was not Voluntary

Being that Petitioner is a native of Guatemala and it's Common Knowledge that police interrogations there are far less benign than even the most aggressive interrogation in this Country.[9] Petitioner is a taxi driver, speaks only spanish, has no arrest record, and undoubtedly is not familiar with the niceties of Miranda or his constitutional right to remain silent (1 CT 232-2 CT 283) His wife was arrested with him and his encounter at the police station surely involved fear of the police and Concern for his wife (7 RT 1868-1869.) Petitioner was arrested about 10:00 a.m. but the interrogation did not begin until 9:00 or 10:00 p.m. (7 RT 1863-1873 1876 8 RT 2531 2532 9 RT 3012.) In the intervening 12 hours between arrest and interrogation, a non-English speaking individual who hailed from a country rife with civil rights abuses surely grew more and more Concerned for his safety and that of his wife.

Under these circumstances, to make certain Petitioner was

Ground [redacted] 2

The Court erred in admitting Petitioner Bautista's Statements in redacted form which eliminated exonerating portions thus depriving him of a fair Trial and due process.

Supporting Fact

The prosecutor "substantially and significantly" redacted Bautista's statement to exclude mention of Guillermina "Meno" Jimenez (Sandoval) and of Bautista's belief that (Janette A.) was a friend on Meno's and a willing participant in the Taco Bell burglary. (Compare) 2-CT-281-282 with 283 284.) The prosecutor's crafted the redaction to (1) defeat appellant/defendant Moran's severance motion and at the same time (2) show that Bautista admitted the Kidnapping and Robbery of Janette A and Pedro Martinez (2-RT E-8 E-10 E-17 E-19 E-20 [Motion for severance].)

However in redacting the statement, the prosecutor excluded exculpatory state-of-mind evidence - Bautista believed that Janette was a part of the Kidnap/robbery scheme. (2CT 283) Kidnapping is a specific intent Crime; if one consents to accompany another, there is no [redacted] Kidnapping. (People v Davis (1995) 10 Cal, 4th 463, 516-517.) similarly, where the Kidnap victim is actually a principal in a Kidnap for robbery scheme, robbery is not the natural and probable Consequence of a Kidnap. (People v. Fletcher (1996) 13 Cal. 4th 451, 470-471.) Therefore, exclusion of evidence of Bautista's belief that

Janette was in on the plan to rob Taco Bell deprived Petitioner of his Constitutional right to a defense and requires reversal of offenses charged in connection with the Taco Bell incident Counts 1,2,4,11,and 14.

A. Severe redaction of Petitioner's Statement to avoid Separate Trials deprived him of Exonerating State-of-mind evidence.

1. Standard of Review

"under Penal Code section 1098, a trial court must order a Joint trial as a "rule" and may order separate trials only as an 'exception'" (People v. Alvarez (1996) 14 Cal.4th 155,190, original italics.) An appellate court reviews an order denying a motion for severance for an abuse of discretion (Ibid.) whether it is an abuse of discretion to deny severance depends on the facts as they appeared at the time of the hearing on the motion. (People v. Pinholster (1992) 1 Cal 4th 865, 932.)

There are two levels of review. The first determines whether the trial court abused it's discretion in denying the motion. If not, the next level of review determines whether the failure to sever resulted in such unfairness that the defendant was deny a fair trial or due process. "The first level of review focuses on what was presented to the trial court at the time it made it's decision. The second level of review focuses on what actually happened in a joint trial." (People v Greenberger (1997) 58 Cal App. 4th 298-343).

2. The trial court abused its discretion because the redaction operated to Petitioner Bautista's detriment

The primary defense was that one of the Complainants, Janette A, was an accomplice to the robberies and not a victim. (7RT 1829.) Taco Bell's loss prevention manager sent a fax (Ex BB) to the Glendale Police department to the effect that he had received information that the victim Janette A. might have been a participant in the burglary, although he recracted that suspicion at trial. (Compare 7RT 2172 with 7RT 2175.) Severance was required to prevent prejudice to Bautista through deletion of the exonerating portions of his statement;

"When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the Trial Court must adopt one of the following procedures: (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any Codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect indentifications of Codefendants but any statements that could be employed against nondeclarant Codefendants once their identity is otherwise established. (2) It can be grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a Codefendant, the trial court must exclude it if effective deletions are not possible." (People v. Aranda (1965) 62 Cal.3d. 518 530 531 fn deleted emphasis added.)

Under Aranda, the trial Court's only Choices were to exclude the statement in its entirety or grant separate trials. Yet, the trial Court denied defendant Moran's motion for severance, and permitted admission of Bautista's statement in its severely redacted form though the testimony of a police officer, Detective Curre (2RT[E] 20-[E]21.) This was error because to deny the motion the Court had to exclude relevant exculpatory, state-of-mind evidence of Janette's Complicity which would have aided Bautista in defending the specific intent crimes.

Extrajudicial statements which explain the accused's state of mind and Conduct are admissible (People v. Hill (1992) 3 Cal 4th 959 987[10].) In Hill the trial Court excluded evidence tending to show that the defendant took Jewelry from the shooter because he feared the shooter would kill him if he did not. This was error. If the Jury believed the defendant's assertion, the Jury could reasonably have rejected the People's contention that the defendant took the Jewelry from the store and hence he was the man who shot and killed the proprietor. If believed, the defendant's statement would have tended to prove why he had possession of the Jewelry. Id at pp. 997-998.)

Petitioner's case is similar. If his statement had been addmitted in it's entirety, the Jury reasonably Could have inferred that "Meno" and Janette set up the entire Taco Bell venture. From that intermediate fact the Jury Could well have concluded that Petitioner was guilty of going along with the plan, but that the requisite specific intent to kidnap and rob was not present. A fortiori, there was no kidnap and robbery was not the natural and probable consequence of a non-

Kidnapping (People V. Fletcher supra 13 Cal 4th at pp 420-421)

[10] Overruled on another point in (Price V. Superior Court (People) (2001) 25 Cal 4th 1046 1069 fn 13)

Few rights are more fundamental than that of an accused to present a defense. Both the prosecution and the accused must comply with established rules of procedure and evidence to assure fairness and reliability in the determination of guilt and innocence. (Chambers V. Mississippi (1973) 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed. 2d. 297.) In Chambers, the Court reversed the defendant's conviction, finding that exclusion of critical exculpatory evidence was a denial of the right to a fair trial. In (United States V Robinson (2d Cir 1976) 544 F. 2d. 110,) the Court revered a conviction holding the exclusion of exculpatory evidence severely prejudiced the defense. The exculpatory evidence would have been sufficient to create a reasonable doubt as to guilt. (Id at p. 112;) see also (United States V. Armstrong (9cir 1980) 621 F. 2d. 951, 953.) [Conviction reversed on count in which exculpatory evidence had been excluded].)

An Aranda/Bruton" issue is not resolved by redacting an extrajudicial statement to delete references to the none declarant Codefendant if doing so results in a distortion to the prejudice to the declarant (People V Douglas (1991) 234 Cal. App. 3d 223 281) In

[11] (People v Aranda supra 63 Cal. 2d 518.) (Bruton v. United State (1968) 391 U.S. 123, 88 S. Ct 1620, 20 L. Ed. 2d 426.)

Douglas, the declarant defendant testified and denied making a telephone Call and possessing a Knife. The effect of deleting references to the Codefendant from his extrajudicial statement was to distort it by Creating an implication of addmission that defendant had placed the Call and possessed the Knife. The result was prejudicial to the declarant requiring reversal. (Id. at p. 282.) In (People v. Tealer (1975) 48 Cal. App. 3d 598,) the trial Court allowed the prosecutor to use a Sanitized version of the defendant's post-arrest statement by substituting "I" for "we" The reviewing Court held the change was error because it Knew "the entire onus of the planned robbery by Converting the sometimes ambiguous and partially exculpatory "we" into an unmistakable "I."" (Id. at pp. 603-604.)

In (People v. Matola (1968) 259 Cal. App. 3d. 686,) the Court held that a trial Court Cannot deny a motion to sever by editing a declarant's statement if the editing deprives the declarant of potentially exculpatory evidence.

"In ruling upon a severance motion, the trial court must be alert at the outset to factors which are harbingers of editorial failure. If the Parts of the Confession affecting a Codefendant favor or may favor the Confessing defendant, the deletion of those statements is not going to stick. The declarant's Counsel will want to bring them out, either upon Cross-examination of the person who testifies to the Confession, or upon direct examination of the declarant if he takes the Stand. were he prevented from bringing out evidence favorable to his declarant client, to protect the nondeclarant, the declarant would himself be prejudiced by the Joint Trial (People v. Matola supa, 259 Cal. App. 3d 686 692-693.)[12]

The exculpatory state-of-mind evidence was a crucial defense because it tended to negate the specific intent required of the crime changed in connection with the Taco Bell incidents. (Cf., In re Saunder (1970) 2 Cal. 3d 1033, 1049.)

B. Counsel Rendered Ineffective Assistance by failing to object to a Joint Trial

The general rule is that the failure to make a formal motion for severance constitutes a waiver. (People v Pinholster, supra, 1 Cal. 4th at p. 931.) This, however, is only the general rule. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (People v. Hill (1998) 17 Cal. 4th 800, 820.) quoting (People v. Arias (1996) 13 Cal. 4th 92, 159.) The Court had already denied Codefendant Moran's motion for severance. Another objection to a joint trial by Petitioner Counsel would have been futile.

Nonetheless, if this Court determines that Petitioner Bautista has not preserved the issue for Petitioner's review because his attorney did not independently move to sever or join in Moran's severance motion or object to the form of the redaction, then Counsel rendered ineffective assistance for not doing so.

12) Superseded by statute on another point as stated in (People v Boyd (1990) 222 Cal. App. 3d 541.)

1. Standard of review

A defendant has the Constitutional right under the sixth Amendant to the effective assistance of Counsel at trial. A defendant claiming ineffective representation must prove by a preponderance of the evidence that Counsel's assistante was deficient, and his representation fell below an objective standard of reasonableness. (In re Ross (1995) 10 Cal. 4th 184, 201.) A Court assesses the reasonableness of Counsel's omissions as they stood when he failed to act (Ibid) whether an attorney's performance was deficient and whether the deficiency Prejudiced the defense is a mixed question of Law and fact. Mixed questions of Law and fact are reviewed de novo. (Ibid.)

2. On these facts, no reasonable attorney would have forgone a motion to sever.

Counsel was well aware that Bautista's statement involved a person name "Meno" as a participant, and information Bautista received from Meno indicating that Janette participated to some extent in this Crime (2RT D13-D-14.) The incriminating information remained; the exonerating material was excised. Yet even after the prosecutor had redacted Bautista's statement to the people's and Moran's benefit and Petitioner detriment, Counsel did not move to sever the causes. In (In re Hall (1981) 30 Cal. 3d. 408) the court held that a defendant was denied effective assistance of Counsel due to the attorney's failure to investigate information which indicated another person was guilty of the offense. (Id. at pp. 427-429) While the instant matter does not involve a failure to investigate, it does Involve Counsel's failure to move for severance or object to a redaction which stripped Petitioner of exculpatory statements which were relevant and crucial to his defense that Janette was in on the Taco Bell program from its onset. Since Janette was a willing principal Petitioner could not be convicted of any of the specific intent crimes connected to the Taco Bell burglary.

3. Counsel's error was prejudicial

In assessing prejudice from Counsel's failure to move for severance or support defendant Meran's motion, the question is whether there is a reasonable probability that, absent the error a reasonably jury could have sustained a reasonable doubt a defendant's guilt. (Strickland v Washington (1984) 466 U.S. 668-687 688 104 S.Ct. 2052 80 L.Ed. 2d 674.) In making that determination, the reviewing the court must consider the totality of the evidence before the jury. Taking the unaffected finding as a given, and making due account of the effect of the errors on the remaining findings, the reviewing court must ask if the defendant has met the burden of showing it is reasonably like the decision would have been different absent those errors. (Id. at p. 695.) The prejudice here was twofold. First by excluding evidence of Bautista's belief that Janette was a party to the plot the court stripped Petitioner of a viable defense to the specific intent crimes. Second, of which more later, the prosecutor used the redaction against Bautista.

4. Admission of the redacted Statement was error of Constitutional dimension

Over objection by Moran's attorney the court ruled the People could use the redacted statement before the Jury, although "they do so at their peril" (2 CT 294-2 RT E-21 E-23.) The prosecutor recognized that it was important to the People's case and to Moran to allow only the redacted statement before the jury – that there be no slip ups with admitting material which had been redacted. (2 RT D16-17.)

As Professor Witkin explained, cases decided before section 28 subdivision (d) was added to Article I of the California Constitution, Courts applied the Watson standard to situations involving a claim of prejudice arising from redacted statements. In the wake of section 28, however, the correct standard is the Chapman test for constitutional error. (Witkin & Epstein Cal. Crim. Law 3d ed, 2000), (Criminal Trial, §§ 390-391, PP. 555-556) (People V. Watson (1956) 46 Cal. 2d 818-835;) (Chapman V. California (1967) 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705;) see also People V. Schmaus (2003) 109 Cal App. 4th 846 860.) [Chapman test applied to erroneous admission of declarant's statements error harmless given the overwhelming evidence against the nondeclarant]; (People V. Douglas Supra 234 Cal App. 3d at p. 288) [reversible error to delete exculpatory portion of declarant's statement]).

In the instant case, the court did not admit the statement, but Permitted Detective Currie to narrate its contents in response to questions. (9 RT 3006.) Currie testified the Petitioner said he owned the Chevrolet Caprice that he parked south of the Taco Bell and Later followed the gray Honda to a parking Lot where a male and Janette were fixing a tire. He moved the Honda to a side street with the male and Janette in it, drove the Chevrolet to Taco Bell and then drove Pedro Martinez to the ATM machine. He was paid $40.00 as a result of what went on (9 RT 3007-3009.) As ordered, Currie said not one word about Meno's solicitation of him as a driver to implement Meno's plan or that Janette had arranged to get them some money. (2 CT 283.) Counsel deemed himself bound by the Court's Aranda/Bruton order. (9 RT 3019.) Consequently, he was unable to delve into the exonerating portions of Petitioner Bautista's statement; Meno told him "that he was a friend of a female employee, 'Janette,' at Taco Bell who was going to give him some money. Bautista warned "Meno" that he would tell the Police everything if the money was obtained illegally" (2 CT 283.) That is exactly what Bautista did but the Jury never heard the truth.

Petitioner's Case is virtually identical to what happened in People V. Douglas supra, 234 Cal App. 3d 223.)

"[The deletion of references to [the nondeclarant Codefendant] in in Petitioner's statement clearly, and inaccurately, implied that Petitioner admitted his involvement in conduct he had explicitly disclaimed. Petitioner was then improperly prevented from presenting evidence that his actual statement was exculpatory on major points. The prejudice to him is obvious and serious.

If the Court had granted the severance motion, deletions of Petitioner statement would not have been required to protect [the nondeclarant codefendant] under Aranda/Bruton. Because the evidence of appellant's involvement in the actual Killing of Amey was far from overwhelming, we cannot dismiss this error as harmless. Reversal of the murder conviction is required." (Id at p.287, Citation omitted.)

In the instant case, the primary evidence against Petitioner was the testimony of Janette and her follow employee, Pedro Martinez. If the Jury had Known of Petitioner's reasonable belief that at Lease Janette (if not Martinez) was a principal in the Taco Bell robbery, the Jury would not have credited her testimony. Moreover, if the Jurors had been privy to these facts, they Could not have found beyond a reasonable doubt that Petitioner harbored the specific intent required for the Taco Bell offenses, particularly Kidnapping, because Janette was in on the scheme from the beginning. In sum, there can be no ample evidence of guilt of any specific intent crime without proof beyond a reasonable doubt that the accused harbored the requisite specific intent.

There is more, Reversal is required where the prejudicial effect of this Kind of error is Compounded by a prosecution argument, Urging the Jury to Consider the excluded evidence in determining guilt-and Lying about the evidence. (People V Varona (1983) 143 Cal. App. 3d 566, 570.)

[redacted] Ground #3

The Prosecutor improperly Commented on non-Evidence and on Petitioner's purported failure to identify others involved in the Taco Bell affair more errors of Constitutional import

Support fact

At the very onset of Trial the prosecutor, inadvertly or intentionally, let potential Jurors know that this was a serious Case which Carried a life sentence. This was wrong. Jurors are not supposed to Consider punishment or penalty. (CALJIC No. 17.42 ["In your deliberations do not discuss or Consider the subject of penalty or punishment."].) The prosecutor wound up the people's Case with additional acts of misconduct.

It is misconduct to represent what a nontestifying witness would have said. (People v. Hall (2000) 82 Cal. App. 4th 813 817.) However, the trial Court automatically overruled every objection made during argument because the Court believed in giving Counsel "Unlimited latitude". (14 RT 6686 6694; 15 RT 7210-7211, 7218; 16 RT 7542.) For example, the prosecuter argued that two of the three witness who did not testify would have lied if they had come to Trial, but "Poof. They all disappeared. No-body Came." (15 RT 7210:15-26). Moran's Counsel objected on the grounds of misconduct and speculation. (15 RT 7210.) The Court simply overruled the objection admonished the Jury and advised the Jury that the defendant has no duty to prove anything. (15 RT

7211-7212.) Then, the prosecutor flat out lied to the Jury at the end of the trial when she completed her argument to the Jury with the statement that Petitioner never told the police that others were involved in the Taco Bell Crimes:

"Mr Bautista chose to make a statement. He was confronted with the Crime."

"And he told us that he drove Janette and Pedro off the parking lot. But not once did he say that Janette or Pedro were involved" (15RT-7231; 4-8 emphasis added.)

This was patently untrue - and the prosecutor knew it (see 2-CT-283)

A. Standard of Review

A prosecutor's improper, misleading or false remarks can so infect a trial with unfairness as to make the accused's conviction a denial of due process. Misconduct which does not render a trial fundamentally unfair is prosecutorial misconduct under state law when it involves the use of deceptive or reprehensible methods or persuade either the Court or Jury (People v. Farnam (2002) 28 Cal 4th 107, 167.) Under either standard, Petitioner conviction must be reversed.

B. Arguing false facts to the Jury Constituted Prejudicial Prosecutorial Misconduct.

Petitioner Bautista explained to the trial Judge that the prosecutor intentionally misled the Jury when she knew that Petitioner had reason to believe Janette was involved and had report the same to the Police. Moran argued it was misconduct for the prosecution to bring before the Jury facts which were not ture (16RT 7533-7534.) They sought an instruction admonishing the Jury to disregard the statement.

"Any argument of Counsel that you should infer from Mr Bautista's statement, that he did not inform the police that either Janette or Peter was involved in the Taco Bell incident is stricken and you are to "disregard the statement." (16RT 7509.)

It is highly unlikely an admonition would have cured the prejudice generated from the prosecutor's false statement because the prosecutor's office carries with it a mantle of credibility which defense attorneys do not (see People v Acevedo (2001) 93 Cal. App. 4th 757, 772;) (People v. Talle (1952) 111 Cal App 2d. 650, 677.) NoneTheLess, Petitioner had to try. Without a proper admonition, the Jury would speculate that if it was an inside Job, as a part of "Coming clean" Petitioner would have told the Police the young woman was in on it too. (16RT 7528, 7530-7531.) The court refused to give the requested admonition because (1) the defense raised a problem which did not exist, (2) The prosecutor did not really commit misconduct by informing the Jury that Bautista never told the Police about his belief in Janette's participation when he did. (3) There was no evidence before the Jury that Janette had anything to do with the robbery and (4) The prosecutor's argument was not evidence (16RT 7545-7546.)

But there was a problem. Courts, Litigants, and Juries properly anticipate that a prosecutor's obligations to refrain from improper methods to obtain a conviction will be honorably observed. (Banks V Dretke (2004) — U.S — 124 S. Ct 1256, 1275 79 L. Ed 2d 1314.) The reason the Jury did not hear about Janette's probable participation is that the court struck the exculpatory portions of Bautista's statement to protect Moran. A prosecutor may Comment on the evidence in denigrating terms (People V Lawley (2002) 27 Cal 4th 102, 156.) A prosecutor may Comment on the failure to produce promised or anticipated evidence so long as he or she does not capitalize on the fact the defendant did not testify (People V Brown (2003) 31 Cal. 4th 518, 554.) A prosecutor may Comment on the absence of exculpatory evidence, but only if those Comments are not of such a Character that the Jury would naturally and necessarily interpret them to a comment on the failure to testify. (People V. Guzman (2000) 80 Cal. App. 4th 1282, 1290.) And, it is misconduct and reversible error for a prosecutor to make a deliberate reference to inadmissible matter from outside the record. (People V Hall supra 82 Cal App. 4th a p. 817;) (People V. Arragon (1957) 154 Cal App. 2d. 646, 654.) It is misconduct for a prosecutor to deceive the Jury with false statements (People V. Varona, supra, 143 Cal. App. 3d at p. 570.) In Varona the accused defended a Charge of oral Copulation on the basis the complaining witness was a prostitute who [redacted] Voluntarilly Consented. The prosecutor managed to exclude evidence that the witness was a prostitute. The prosecutor then argued that the defendant had not presented any evidence to Corroborate his claim of consent. In reversing the Conviction the

Court Condemned the prosecutor's misconduct:

"Here the prosecutor not only argued the "lack" of evidence where the defense was ready and will to produce it but he compounded that tactic by actually arguing that the woman was not a prostitute although he had seen the official records and Knew that he was arguing a falsehood. The whole argument went beyond the bounds of any acceptable Conduct" (Id at p 570)

The mild instruction that the prosecutor's argument was not evidence did nothing to obliterate the false notion firmly planted in the Jurors' Collective mind that since Bautista spoke to the police he naturally would have told the officers about Janette if he believed she was involved. Since he did not, according to the prosecutor's false statement, Petitioner bore more blame than he ought to have. (People V. Schiers (1958) 60 Cal. App. 2d 364, 379) dis. of Carter, J. [to hold that serious error "is blotted out of a Jurors mind by a mere incantation is as fictional as John Doe"])

"Prosecutor's dishonest Conduct... Should attract no Judicial approbation" (Banks V Dretke Supra 124 S. Ct. at p. 1275.)

C. The issue of Prosecutorial Misconduct has been Preserved for Petitioner's Review

The general rule is that a claim of prosecutorial misconduct will not be considered on appeal unless the objection has been made and a request for an admonition sought except where an admonition

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would not have cured the error. (People v. Cunningham (2001) 25 Cal. 4th 926, 1000-1001.)[13]

When it became clear to defendant Moran's counsel just before noon recess that in her closing argument the prosecutor intended to talk about Bautista's statement, he objected on the grounds of prosecutorial misconduct and sought a mistrial: "Counsel is undoubtedly going to argue things not in the redacted statement." (15 RT 7226.) Petitioner Bautista joined in the objection to the extent the prosecutor stated it was Moran who chose to speak to the police instead of Bautista. The court overruled the objections and denied the motion because the anticipated argument had not yet been made. (15 RT 7228.) The court announced the noon recess. Immediately after the lunch break, and very near the end of her argument the prosecutor did exactly what the defense had anticipated. She told the jury that Bautista did not tell the police that Janette and/or Pedro Martinez were involved in the Taco Bell incident-which was directly contrary to Bautista's statement.

[13] Cert. den., 534 U.S. 1141, 122 S. Ct. 1092 151 L. Ed 2d 991 (2002).

Implicitly conceding misconduct the prosecutor argue that Petitioner waived the issue by not making an on-the-spot objection. Petitioner responded that his objection was as timely as it could be. The prosecutor made the false statement at the virtual end of her argument, within minutes after the prosecutor ended her argument the Jury was excused (see 16 RT 7536.) The court had overruled every objection made during argument to give the People "Latitude" I other words show pity for prosecutor (14 RT 6686, 6694; 15 RT 7210-7211, 7218; 16 RT 7542.) Still the very next morning, in response to the prosecutor's erroneous and misleading argument, defendants Jointly proposed the instruction admonishing the Jurors that they were to disregard the prosecutor's argument on this point (16 RT 7503, 7509.) Counsel vigorously argued his Position:

"[W]e're not talking about the evidence. We're talking about the statement Bautista made to the police. We're talking about the statement she presented to the court that was redacted. We're talking about her closing argument."

"So my position is this; If the court wishes to find waiver on my behalf and allow her to, in bad faith argue that Mr Bautista never said anything... that would infer [sic, Imply] that Pedro or Janette were involved, I'll stick to Janette. She's the one mentioned, Knowing there is a strong Inference here when he says Meno replied he was a friend of the female employee, Janette a Taco Bell[;] who was going to give him the money. Meno's no surprise to her. She Knows who he is. Everybody Knows who he is....

"Now, the court Knows [the prosecutor's argument] is a misstatement of fact...." (16RT 7541-7542.)

Both defendants moved for a mistrial based on the denial of due process under the fifth and fourteenth Amendments caused by prosecutorial misconduct. (16RT 7547-7548, 7550.)

Petitioner also raised prosecutorial misconduct in his new trial motion (4CT 911.) Petitioner argued "that the reason Bautista's entire statement, including his statement to the Police that he thought that the two alleged victims were in on the crime, was not admitted was to avoid a severance of the defendants. Under the guise of protecting Moran from prejudice, Bautista's statements incriminating Moran were excluded- along with his statements supporting his defense that Janette was part of the kidnap/robbery plan. The prosecutor then turned that purported protection for Moran into a sword and "stuck it to" Bautista by arguing that the absence of any words that others were involved in the conspiracy proved his guilt. (see 4CT-911; 18RT-11136-11138.)

In ruling on the new trial motion, a different court found that there was no "Prejudicial" misconduct. (19RT 11477.) Implicit in that finding is that the prosecutor did commit misconduct, but lack of an immediate objection was not sufficient to preserve the error, even though it may have been futile to object and despite the fact Petitioner sought a curative instruction. (19RT 11427-11428.)

[14] The reporter has identified the speaker as "Right 1." (18 RT-11136.) Inasmuch as the error affected Petitioner Bautista most directly, and he was identified as "Defendant No. 1," we assume the speaker was his attorney, but even if it was Moran's Counsel, an objection made by one defendant should be considered an objection by both. "This is reasonable, since one defendant's objection was overruled it was futile for any other defendant to raise the same objection" (People V. Pitts (1990) 223 Cal. App. 3d 606, 693.)

Petitioner insists there was no waiver because the objection was made as soon as was practical, his attorney proposed a Connective instruction and moved for a mistrial. In the alternative, if this Court decides the objection was not timely and hence Counsel's subsequent attempts to rectify the error were futile, then Counsel rendered ineffective assistance because no reasonably Competent attorney would have allowed a false statement go by without an Objection. Either way, the misconduct rendered the trial fundamentally unfair because the prosecutor deliberately planted a false fact in the Minds of the Jurors.

There is more, In addition to arguing false and incriminating facts from outside the record, the prosecutor's misconduct Constituted Griffin error.

D. The Prosecutor's Comment on Petitioner's alleged failure to give the police additional information was Griffin error of Constitutional proportion

By accusing of not telling the police that others were involved and that he believed Janette was a participant, the prosecutor improperly commented on the fact Petitioner chose to exercise his Sixth Amendment right to Counsel and his fifth amendment right not to testify. This is Griffin error and proscutorial misconduct that violated Petitioner right against self-incrimination under the Federal and California Constitutions, and rendered the trial fundamentally unfair in violation of Petitioner's right to due process under the Fourteenth Amendment. (Griffin v. California (1965) 380 U.S. 609, 85 S. Ct. 22, 14 L. Ed. 2d, 106.)

"It is a bedrock principle in our jurisprudence that one cannot be compelled to testify against oneself." (People v Hardy (1992) 2 Cal. 4th. 86, 154; U.S. Const. Amend. V; Cal Const., art. I §15.) "In order that an accused not be penalized for his invocation of this fundamental right, the prosecutor may neither comment on a defendant's failure to testify nor urge the Jury to infer guilt from such silence" (People v Hardy, supra 2 Cal 4th at p. 154.) (Griffin v California supra 380 U.S. 609.)

1. Standard of Review

In (People v Clair (1992) 2 Cal. 4th 629,) the Supreme Court

Clarified in the context of both prosecutorial misconduct and Griffin error that the appropriate test of error is the "reasonable Juror." The focus of the inquiry is "whether there is a reasonable Likelihood that the Jury misconstrued or misapplied the words...." (Id. at pp. 662-663.) Coming as they did at the end of her argument, there is every Likelihood the Jury heeded the prosecutor's false words.

2. The Prosecutor's argument fell within Griffin's Prohibition

Although Griffin involved a direct reference to the defendant's failure to testify, the decision has been interpreted as Prohibiting the prosecution from so much as suggesting that the Jury may view the defendant's silence as evidence of guilt. (United State v. Robinson (1988) 485 U.S. 25, 32, 108 S. Ct. 864, 99 L. Ed 2d 23;) (People v. Guzman (2000) 80 Cal App. 4th 1282, 1287.) The Supreme Court has declared, "Under the rule in Griffin, error is committed whenever the prosecutor Comment, either directly or indirecly, upon defendant's failure to testify in his defense." (People v Medina (1995) 11 Cal 4th, 694, 755, emphasis added.)

In Griffin, the Court held that even Limited Comment by the prosecution on criminal defendant's failure to testify is constitutionally impermissible. The Griffin rule prohibits Commenting on a defendant's failure to testify indirectly or by innuendo as well as directly. California Courts have Consistently followed Griffin. For example, in (People v Mendoza (1974) 37 Cal. App. 3d 1717, 1726.) the Court Condemned "Thinly veiled" Comments about the case being hard to defend as tantamount to telling the jurors that they should Consider the defendant's failure to testify. Petitioner's Case warrants the same Condemnation.

In (People v. Tealer, supra 48 Cal. App. 3d 598.) a redaction to protect a Codefendant effectively cast the entire onus of guilt on the declarant. The defendant testified and denied making the statement. The prosecutor Commented to the Jury that the defendant did not deny the facts of the case when he had the opportunity to do so (Id. at pp. 601-602 & fn. 6.) Then the Court instructed the Jury it Could take into Consideration the defendant's failure to explain the evidence against him. (Id. at p. 603 fn. 8.) "This was clear Griffin error." The reviewing Court held that the redaction Caused "prejudice to the declarant" in violation of Aranda. That in Conjunction with Griffin error mandated reversal despite substantial evidence of the defendant's guilt (Id at p. 602.)[15]

In similar vein, in (People v Guzman supra, 80 Cal. App. 4th 1282,) a hit-and-run case, the accused argued self defense. The prosecutor emphasized the while Guzman fled the scene, the victim made himself available to the police, put himself under oath, and testified. The plain impact of this line of argument was that Guzman did not speak to the police and did not take the stand (Id. at pp. 1285-1286.) As in the instant case, the prosecutor's argument rested on a falsity:

[11] The prosecutor's remarks also implied that Guzman was unwilling to speak with the police, but this is not ture. As defense counsel explained to the court, Guzman did tell the police his side of the story. The prosecutor had every right not to introduce this statement at trial. However, for him to then turn around and suggest Guzman was hiding something by not cooperating strikes us as being particularly odious" (Id. at p 1289. fn 3.)

[15] The reviewing court addressed Griffin error even though "defendant has failed to appreciate the full significance of his strongest contention on appeal - and the only one with any substantial merit - he has at least recognized the tip of a Griffin iceberg" (People v Tealer supra, 48 Cal App. 3d at p. 600.)

The effect of the prosecutor's "odious" conduct was that he "rather clumsily alerted the Jury that.... Guzman was not willing to explain his side of the story in court" (Id. at p. 1288.) The prosecutor clearly went beyond general commentary by indirectly but implicitly criticizing Guzman for not testifying. (Id. at pp. 1289-1290;) see also (People v Medina supra, 41 Cal. App. 3d at p. 457) [on similar facts the court noted, "Little discussion of authority is necessary to demonstrate that this was Griffin error."].)

In Petitioner's case the prosecutor's equally odious conduct conduct constituted Griffin error because she argued that Petitioner Bautista did not tell the police that he believed Janetta was participant and that she and Meno had an arrangement to rob Taco Bell. The only persons who could have countered her argument were Detective Currie who the court ordered not to go beyond the redacted statement, Petitioner's counsel who was bound by the court's order, and Petitioner who did not testify. The prosecutor not only argued a falsehood, she committed Griffin error.

E. Prejudicial Prosecutorial Misconduct Generated Serious Constitutional Violations

The prejudice generated by the unfair redaction was compounded by the prosecutor's argument and Griffin error and operated to deprive Petitioner of his fifth Sixth, and fourteeth Amendment rights.

In garden variety claims of prosecutorial misconduct, it is said that a conviction will not be reversed unless the conduct has rendered the trial fundamentally unfair. This occurs when the prosecutor resorts to the use of deceptive or reprehensible methods to persuade either the court or jury of a certain issue of fact. (People v Hackett (1982) 30 Cal.3d. 841, 866.) Even then prosecutorial misconduct will not result in a reversal unless the defendant would have obtained a more favorable result in the absence of the misconduct (People V Milder (1988) 45 Cal.3d, 227, 245.)

However, because Griffin error is error of Constitutional dimension, the Judgement must be reversed unless the Court can say the error was harmless beyond a reasonable doubt. (Chapman V. California, supra. 386 U.S. at p. 24.) Our Supreme Court has interpreted this to mean that the Judgement of Conviction must be reversed if there is even a reasonable Likelihood that the Jury may have constured the prosecutors remarks or applied his or her words in a manner which violates the Constitution. (People V Clair supra, 2 Cal 4th a p. 663.) The People Carry the burden of proving that the remarks were harmless beyond a reasonable doubt. (People V. Guzman, Supra. 80 Cal. App. 4th at p. 1290.)

The Original error belonged to the Court. Under Aranda, the Court must not permit a redaction which operates to the detriment of the declarant. Yet, the Court permitted the prosecutor do this very thing in order to protect moran and avoid separate trials. Then, the prosecutor seized upon that error to Craft an ending to her closing argument which Left the Jury with the false impression that Petitioner never told the police that he believed Janette was in on the plan to rob Taco Bell. When a prosecutor takes advantage of a trial error to bolster an argument in favor of Conviction, the result is prejudice to the defendant and denial of a fair trial. (People v Daggett (1990) 225 Cal. App. 3d. 251, 758.) when a prosecutor uses a redacted portion of an extrajudicial statement as evidence of guilt during final argument, reversal is mandated. (Cf. People v Fletcher, supra 13 Cal. 4th at p 471) ["The prejudicial effect of the error [inadequate redaction] was Compounded by the prosecutor's argument to the Jury...."].)

In case after Case, despite the strength of other evidence, and even without Griffin error, reviewing Courts have reversed Convictions under same or similar facts as those here. [16] (People v. Varna supra 143 Cal. App. 3d at pp 566) and (People v Douglas supra 234 Cal. App. 3d.

[16] In (People v. Matola supra 259 Cal. App. 2d at pp. 692-693.) the Court reversed a Conviction because the Court erred in denying a severance motion when a Codefendant's statement Could not be redacted.

In People v. Guzman supra 80 Cal. App. 4th at p. 1290.) the Court reversed a Conviction because it Could not say that the prosecutor's argument which indirectly focused on the defendant's silence was harmless beyond a reasonable doubt.

In People v. Tearer, Supra. 48 Cal. App. 3d at p. 602.) the Court reversed despite substantial evidence of defendant's guilt, recognizing the possibility that argument which suggested the defendant's silence was evidence of guilt "might have contributed to the Conviction."

In People V. Gaines (1997) 54 Cal.App. 4th 821, 826,) the reviewing Court reversed the defendant's Conviction because, after a careful review of the record, the Court Could not "declare an abiding Conviction that the prosecutor's misconduct was utterly irrelevant to the Jury's verdict" at p. 287, are most Like our Case, In Varna, the Court reversed because, as in the instant Case, the prosecutor argued there was no exculpatory evidence when the defense was ready and willing to [redacted] Produce it, but the prosecutor blocked its admission. In Douglas, the Court reversed because redaction of the defendant's statement to protect a Codefendant deprived the defendant of the exculpatory portions of his statement.

As Counsel argued to the trial Judge, Bautista's statement went to his state-of-mind at the time he spoke to the police. (16RT 2549-2550-19RT 11433.) Petitioner's Conviction should be reversed because the redaction unfairly deprived him of the exculpatory portions of his statement which would have cast serious doubt on his intent to Kidnap and Commit the other specific intent Crimes alleged in Connection with the Taco Bell offenses. The prejudice generated by the improper redaction was aggravated by the prosecutor's use during argument of that excluded material as proof of guilt. Regardless of the standard, 56

applied, on this record it Cannot be said beyond a reasonable doubt that the errors were harmless. The results was unfair and a denial of due process. Petitioner Convictions should be reversed.

[redacted] Ground #4

Admission of hearsay in the guise of Spontaneous Statements deprived Petitioner of a fair trial and Due Process

[redacted]

Under the guise of "Spontaneous Statements," the court allowed Officer Mendoza to tell the Jury what Janette R. allegedly told him in a post event interview. Both defendants objected and made a joint motion to keep a running motion to strike the hearsay testimony of Officer Mendoza (2-CT-388.) The court erred in admitting Mendoza's testimony and that of officer Gonzalez because Janette's words to them were far from spontaneous. Admission of the evidence was prejudicial, and deprived Petitioner of a fair trial on the Taco Bell charges.

A. Standard of Review

Whether the requirements of the spontaneous statement exception have been met is largely a question of fact left to the determination of the trial Court. (People v. Poggi (1988) 45 Cal.3d. 306, 318)" In performing this task, the Trial Court necessarily exercises some element of discretion. Trial Court's discretion is at it's broadest when it determines whether the statement was made while nervous excitement dominated and before the declarant had an opportunity to contrive and misrepresent. (Id at pp. 317-319.) On appeal, the trial Court's factual finding will not be disturbed unless the facts upon which it relied are not supported by a preponderance of the evidence. (People V. Trimble (1992) 5 Cal.App.4th 1225, 1233.)

[17] (Cert. den. (1989) 492 U.S. 925, 109 S. Ct. 3261, 106 L.Ed.2d)

Deference to the trial Court's exercise of descretion does not, however, "Transform appellate courts into mere spectators." (Iott V Franklin (1988) 206 Cal.App.3d 521, 527.) Thus, notwithstanding this defferential standard of review, Petitioner Contends the trial Court's ruling admitting the statements Janette allegedly made to the police officers was error.

B. The Trial Court erred in Admitting the hearsay because it fell Outside the Ambit of Evidence Code § 1240

To render hearsay statements admissible under the spontaneous declaration exception in (Evidence Code 1240,[18]) it's required that "(1) there must be some occurrence startling enough to produce this nervous existement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supported still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the occurrence preceding it" (Showalter V. western Pacific R.R. Co, (1940) 16 Cal.2d. 460, 468.)

"18 Evid. Code §1240 Provides;

"Evidence of a statement is not made inadmissible by the hearsay rule if the statement;

"(a) Purports to narrate, describe, or explain an act condition or event perceived by the declarant; and."

"(b) was made spontaneously while the declarant was under the stress of excitement caused by such perception".

"The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate that they are deemed sufficiently trustworthy to be presented to the Jury." (Ibid.) The basis for this circumstantial probability of trustworthiness is that "in the stress of nervous excitement the reflectives faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief." (Ibid.)

There are two aspects to spontaneous statements or utterances within the meaning of (Evidence Code section 1240.) The first is initiated by the speaker in the throes of excitement and without any prompting. This type of spontaneous is reflected in (People V. Hughey (1987) 194 Cal.App.3d. 1383,) where officers approached a woman yelling "Help me" Three or four minute Later, when asked what happened, the woman stated that defendant had physically assaulted her and tried to suffocate her baby. This qualified as a spontaneous statement (Id. at p. 1388.)

The second aspect of section 1240, is to describible actions undertaken without deliberation or reflection. The latter is what is intended in (Evidence Code section 1240) (People V. Farmer (1989) 47 Cal. 3d 888, 903.) In Farmer, the Court approved admission of spontaneous statements uttered in response to a lengthy police interrogation because the declarant was in intense pain from gunshot wounds, rightfully concerned about his survival, and so preoccupied that he had little opportunity and incentive to deliberate. (Id. at p. 904; see also (People V. Poggi, supra 45 Cal. 3d, at pp. 319-320) [statements admissible on facts similar to Farmer].)

At the same time, however, the Farmer Court Cautioned that it is a rare thing to permit the admission of answers to extensive and belated questioning as spontaneous utterances. (People V. Farmer, supra, 47 Cal. 3d at p. 904.) Indeed, the general rule is that statements made in response to questions posed by officers after the declarant has time to reflect should not be admitted. (People V. Keelin (1955) 136 Cal. App. 2d, 860, 870) [error to admit as spontaneous statements responses to questions a considerable time after the event.]) Further, although a time element may not be mechanically applied, it is an important factor. (See also Wiley V. Easter (1962) 203 Cal. App. 2d 845, 854-855) [questions from a police officer some 20-60 minutes after the event require the declarant to pause and think; responses not spontaneous statements].)

In (People V. Pearch (1991) 229 Cal. App. 3d. 1282) about an hour an 45 minutes before his death, the victim's called his brother, told him be was being hurt, and asked to borrow money. (Id. at p. 1288) The trial Court admitted the victim's statement that he was being hurt as a spontaneous statement. (Id. at p. 1289) The reviewing Court disagreed because there was nothing in the record suggesting the victim did not have an opportunity to reflect in the interim between the time he was hurt and the time of the phone call. Nothing in the record Showed he was in an excited [redacted] state and unable to reflect or deliberate when he made that call (Id at pp. 1290-1291.) Therefore, the trial court erred in admitting the victim's statements under the spontaneous declarations exception to the hearsay rule. (Id. at p. 1291.) The Court reversed the defendant's conviction for the erroneous admission of hearsay statements. (Id at p. 1295.)

The statements in the instant case do not fall within the parameters established by the statute or decisional law because the declarant was not near death or suffering intense pain, and because, as was the situation in Pearch, Janette had ample of time to clam herself, discuss the events with Martinez and her mother, brush her teeth, make phone Calls and deliberate before responding to the officers' questions.

When the prosecutor started to elicit from officer Mendoza hearsay Consisting of what Janette told him in response to his question during his interview with Janette, Moran's attorney objected on hearsay grounds. The Court sustained the objection. (6 RT 1580-1581.) The prosecutor insisted that the hearsay was admissible as a prior inconsistent statement and not admitted for the truth of the matter. Petitioner objected and sought an offer of proof. (6 RT 1584.) The Court ordered the prosecutor to make such an offer but not satisfied with that offer delayed ruling until the following day. (6 RT 1587.)

The very next morning the defense came prepared to argue that the doctrine of prior inconsistent statements did not apply. (7 RT 1806-1810.) But, without notice to the defense, the prosecutor changed tactics, now arguing that Janette's responses to the officer's questions really were "spontaneous utterances" and presenting the Court with cases on that new subject. (7 RT 1804-1806.)

Petitioner objected vehemently because there was nothing "spontaneous" about her responses to the police officer's questions. The Crime started at 3:15 am. The officer took her statement (Two hours) Later. (7 RT 1813; 2 CT 387.) The prosecutor argued there was only a nine (9) minute interval between the end of the crime and officer Mendoza's interview. (7RT 1815-1816.) That is a virtual impossibility. As counsel explained, the prosecutor was "Playing games with the clock." (7 RT 1817-1818.) First, Janette and Martinez sat in his car for ten or 15 minute after their assailants left, discussed the matter and what had happened to Janette, and jointly decided what to do.

"And on the way to Janette's house we were thinking and trying to decide whether to make a report or not to make a report to the police about the incident. [¶] And we got to the agreement that we had to make a report" (4RT 386:5-10 5RT 645; 6RT 1319.)

Martinez drove Janette home (6RT 1316-1317.) Janette told her mother what happened, but thoughtfully edited what she told her mother, carefully omitting all mention of the purported sexual assaults. (6RT 1317-1318.) She brushed her teeth and gargled. (9 RT 3400.) Obviously concerned that Taco Bell managers would believe Martinez and Janette were responsible for the theft, before they called police, they called the Taco Bell manager, but got no answer. Next, they called the assistant store manager, but still did not get an answer. (4RT 386-387.)

Finally, they were able to reach the store's shift manager and explain what happened. (6RT 321.) After all this, the police were called (6RT 1321.) Far more than nine minutes had to have elapsed. And, by the time the police arrived, intervening discussions and events calmed any residual stress and fear (see 7-RT-1824.) In fact, immediately after the interview Janette was taken to the hospital for examination and described as cooperative and "very quiet and reserved" (9RT-3327.)

The court decided the statements were not excited utterances, but spontaneous statements made without time to reflect, consider, or fabricate. According to the court Janette's statements to the officer qualified because she has "In a state of shock, scared to death, hysteral" and the passage of time and intervening event were not relevant (7RT 1831.) The officer testimony was admissible as a spontaneous statement, but not as a prior inconsistent statement. (7RT 1832.) The court was mistaken because, as explained above, it was unreasonable to believe that Janette was still "under the stress of excitement" (See In re Daniel Z. (1992) 10 Cal. App. 4th 1009, 1022.)

C. Erroneous Admission of the hearsay Evidence was prejudicial

The jury has already heard Janette's testimony. The officer who interviewed Janette, over vigorous objections, was permitted to narrate from his report what Janette said, thus repeating essentially the same facts Janette testified about. (7RT 1839-1843.)

Detective Michelle Gonzalez also responded to Janette's home and interviewed her. Over hearsay and section 352 objection's the Court permitted Detective Gonzalez to narrate what Janette said to her, expanding on Janette's testimony and going sentence by sentence from her report. (7RT 1905-1914, 1916-1918.) The Court overruled the objection because everything Janette told officer Gonzalez were "Spontaneous statement." (7RT 1920-1926.) The officer said that Janette said that her assailant was a short, chubby, dark haired Hispanic. (7RT 1927.) The officer Continued to repeat what Janette purportedly told her (7RT 1927-1930.)

The Jury should not have heard Janette's tale over and again from the officers in the guise of spontaneous statements. Importantly, Unlike the Cases the prosecutor Cited, there was no immediacy to Janette's statements to the officers. There were superseding intervening factors; time had passed. (7RT 1817-1819.) Still, through the officers the Jury heard anew everything Janette had already testified about- thus doubling and tripling the prejudicial effect of her testimony. (7RT 1839-1843.) Having heard the details from Janette, repetition of those details Could have had no other effect than to inflame the passions of the Jury. That is prejudice.

Petitioner Concedes that if this was the only error in this very Lengthy trial, it would not be necessarily be so prejudicial as to Constitute a due process violation and reversible error. But, it does so when considered in Conjunction with the multiple error in this case. Accordingly as in Pearch, Petitioner Bautista's Conviction of the Taco Bell offenses should be reversed for the erroneous admission of hearsay evidence in the guise of spontaneous Statements ace this prejudicial evidentiary error undoubtedly affected the Jury's deliberation on all Counts

Ground #5

THE VERDICTS IN COUNTS 8, 9, AND 10 THE EL POLLO LOCO INCIDENT, SHOULD BE REVERSED FOR INSUFFICIENT EVIDENCE.

There is insufficient evidence to support Petitioner Bautista's convictions of the Counts related to the El Pollo Loco offenses.

A. Standard Review

"The proper test for determining a claim of insufficiency of the evidence in a criminal case is whether, on the entire record a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, [the reviewing Court] must view the evidence in the light most favorable to the people and must presume in support of the Judgment the evidence of every fact the trier could reasonably deduce from the evidence." People vs Jones (1990) 51 Cal. 3d. 294, 314; People vs Johnson (1980) 26 Cal. 3d 557, 577.)

The evidence must be substantial; it is not enough for the respondent to point to some evidence (People vs Johnson, supra, 26 Cal. 3d at p. 577) For evidence to be "substantial" it must be reasonable, credible, and of solid value (Id. at p. 576.) The "evidence" may have been sufficient to connect Moran to the El Pollo Loco offenses, but the identifications of Petitioner were far to amorphous to constitute substantial evidence connecting him to the crimes.

B. BECAUSE THE EYEWITNES IDENTIFICATIONS WERE NOT CREDIBLE, APPELLANT'S CONVICTIONS SHOULD BE REVERED

It is now well established that eyewitness identification of strangers is extremely unreliable: "The vagaries of eyewitness identification are well Know; the annals of Criminal Law are rife with instances of mistaken identification." (United State vs Wade (1967) 388 U.S. 218, 288, 87 S. Ct. 1926, 18 L. Ed. 2d 1149.) As our Supreme Court has observed:

"There is great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation and this risk is increased when the observation was made at a time of stress or excitement. . . [This] danger is inherent in every identification of this Kind. . . The problem is important because of all the evidence that may be presented to a Jury, a witness' in-Court statement that 'he is the one' is probably the most dramatic and persuasive" People vs McDonald (1984) 37 Cal. 3d. 351, 363-364," [19] quoting United State vs Russell (6 Cir. 1976) 532 F. 2d 1063, 1066.)

There were four witnesses who testified about the EL Pollo Loco burglary, Laura, Black, Ivan, Estrada, Nancy Salangsang and Martin Ocos. Estrada was not able to identify anyone, (11 RT 4571.) Black was able to indentify Moran from a photo six-pack (NO. 2 Position) and in court only as "someone who most resembled the man with the gun.

[19] Overruled on another point in People vs Mendoza (2000) 23 Cal. 4th 896, 914.

(11 RT 4226, 4289, 4295, 4301.) Black was unable to indentify Bautista in a Lineup or in Court (11 RT 4292-4294.)

Cross-racial indentifications are among the most unreliable. People vs McDonald, supra 37 Cal 3d at p 364 & fn 9.) Nancy Salongsang a Filipino woman who testified through a Tagalog interpreter, described the man who grabbed her, pressed a gun into her back, and pushed her into the Kitchen and thence into a back office, as neither fat nor thin (11 RT 4578 4580 12 RT 5108) Petitioner is a short Hispanic man. He is "heavy-set" and "fat" (5 RT 657-658.) Salongsang did not recognize anyone in a photo six pack Containing Petitioner's picture or in a live Lineup (12 RT 4842, 4863, 4823.) Nonetheless, in Court Salongsang purportedly identified Petitioner who is very heavy, as the "neither fat nor thin" man who grabbed her (11 RT 4578; 12 RT 4829.) The prosecutor did her best to Confuse Salongsang and suggest to the Jury that she did identify Bautista before Trial when she did not. (see 12 RT 4815 4824.) The court blithely overruled repeated objections that the prosecutor was twisting the truth and misleading the Jury. (12 RT 4812.)

In view of the vast difference in the description Salangsang gave right after the Crime and Petitioner's actual appearance, her inability to pick him out of a photo array or live Lineup shortly after the Crimes, the prosecutor's unwillingness to accept the fact that salangsang did not indentify Petitioner before Trial, and Considering the unreliability of crossracial identification's, Salangsang's in-court identification two years after the fact lacks all Credibility.

That leaves Martin Oros. After the robbery, Oros described one of the robbers as a white male 5'6" tall Clean shaven, and thin"[20] (12RT 4511) Again Petitioner Bautista is obviously "Hispanic and fat" neither "white" or "thin." In the prosecutor's direct examination she use so many exhibits numbers and asked so many misleading questions that Oros became so hopelessly Confused it's virtually impossible to determine who he had indentify and when (12RT 4505-4509.) In fact, Oros admitted he was Confused by which lineup the prosecutor's asked about in her direct examination (12RT 4522.) This makes his in-court indentification (12RT 4504) of Bautista as the thin, white man who hit him in the face at El Pollo Loco unbelievable. Oros' indentification of Bautista is Lacking all reasonable, Credible, Solid value.

All of these witness were under extreme stress in a violent situation Controlled by at least on man with a gun, psychological factors recognized as leading to misidentifications (People vs McDonald supra 37 Cal 3d at pp. 362, 375-376.) In addition, the indentification of strangers is highlty suspect when no other evidence Connects the accused to the Crime (Id at pp. 362, 363.) In the instant Case, nothing-no fingerprints, no forensic of any Kind-Connected Petitioner to the El Pollo Loco burglary and robberies. Petitioner's Convictions of Counts 8, 9 and 10 Should be reversed for want of sufficient evidence.

[20] Oros described the second man as a male Hispanic wearing a blue baseball Cap. He did not see this man face although he heard him speak spanish (12 RT 4512) However, a blue Cap was identified as belonging to codefendant Moran,

Ground #6

INSTRUCTIONAL ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL AND DUE PROCESS

Court and Counsel argued and fought over jury instructions in marathon sessions held over seven days and continuing even after the jury began deliberating - with the prosecutor generally prevailing (2 CT 445, 450, 454, 458, 463, 466.) In the end there were at lease two serious instructional errors. The first was CALJIC No. 3.00/3.02,[21] a hybird instruction in which the prosecution grafted a portion of the natural probable Consequences doctrine onto the aiding and abetting instruction, but failed to identify Target offenses or which Crimes were the unintended result of the target Crimes. The second was not Limiting CALJIC No. 2.06 to defendant Macan when it was his family members who allegedly threatened Janette A.[22] This error infected the Conviction of both The Taco Bell charges and the EL Pollo Loco Charges.

[21] CALJIC NO. 3.00 Provides:

"Persons who are involved in [Committing] [or] [attempting to Commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively [Commit] [or] [attempt to Commit] the act constituting the crime, or [¶] 2. Those who aid and abet the [Commission] [or] [attempted Commission] of the crime.

CAL JIC No. 3.02 Provides:

"One who aids and abets [another] in the commission of a Crime [or Crimes] is not only guilty of [that Crime] [those Crimes], but is also guilty of any other Crime Committed by a principal which is a natural and probable Consequence of the Crime[s] originally aided and abetted.

"In order to find the defendant guilty of the Crime[s] of ____ [as Charged in Count[s] ____] you must be satisfied beyond a reasonable doubt that;

"1 The Crime [or Crimes] of [was] [were] Committed;

"2 That the defendant aided and abetted [that] [those Crimes]

"3 That Co-principal in that Crime Committed the [Crime[s]] of ___ and

"4 The Crime[s] of [was] [were] a natural and probable Consequence of the Commission of the Crime[s] of ____"

A. Scope and Standard of Review

A Trial Court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence, that is, those closely and openly Connected with the facts before the Court which are necessary for the Jury's understanding of the Case People vs Sedeno (1974) 10 Cal. 3d. 703, 715,[23] Quoting People vs St. Martin (1970) 1 Cal. 3d. 524, 531,) A criminal defendant is entitled to accurate Jury instructions. (See, e.g., People vs LeCorno (2003) 109 Cal. App. 4th 1058, 1070. [reversing Conviction because of erroneous instruction].)

[22] CALJIC NO. 2.06, instructs:

"If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to Compensate a witness] [by destroying evidence] [by Concealing evidence] [by], this attempt may be considered by you as a Circumstance tending to show a Consciousness of guilt. However, this Conduct is not sufficient by itself to prove guilt, and its weight and significance if any, are for you to decide.

[23] Overruled on another point in People vs Blakeley (2000) 23 Cal 4th 82, 89.

In reviewing a claim of instructional error, the Court Considers the jury instructions as a whole in the Context of the Charge and [redacted] (People vs Haskett (1990) 52 Cal. 3d. 210, 235.) An inaccurate or misleading instruction is grounds for serversal when it Cannot be said that the instruction was harmless beyond a reasonable doubt. People v Lee (1987) 43 Cal. 3d 666, 676, Chapman vs California, supra, 386 U.S. at p. 24.

B. NO PART OF CALJIC NO. 3.02 should have Been Grafted onto No 3.00 Because the Prosecution's Theory was that both Defendants were Principals.

This is the instructions the Court gave over multiple objections:

"One who aids and abets another in the Commission of a Crime is not only guilty of that Crime, but is also guilty of any other Crime Committed by the principal, which is a natural and probable consequence of the crime originally aided and abetted."

"whether a Consequence is natural and probable is an objective test based not on what the defendant actually intended, but what a person of reasonable and ordinary prudence would have expected would be Likely to occur."

"The issue is to be decided in light of all of the Circumstances surrounding the incident."

"A 'Natural Consequence' is one which is within the normal range of outcome that may be reasonably expected to occur if nothing unusual has intervened.

"'Probable' means Likely to happen." (17 RT 8720-8721.)[24]

We start with the basic principal that accomplice instructions should not be given when the defendant is Charged as a principal. People vs Prettyman (1996) 14 Cal. 4th 248, 268-269 [instruction should not been given when prosecution has not elected to rely on that particular theory of accomplice Liability] People vs Brown supra 31 Cal.

14th at p 559.) As this Court has observed:

"The Trial should grant a prosecuter's request that the Jury be instructed on the natural and probable Consequences' rule only when (1) the record Contains substantial evidence that the defendant intended to encourage or assist a Confederate in Committing a Target offense, and (2) The Jury Could reasonably find that the Crime actually Committed by the defendant's Confederate was a 'natural and probable Consequence' of the specifically Contemplated target offense. If this test is not satisfied, an instruction should not be given, even if specifically requested." People vs Gonzalez (2002) 99 Cal. App. 4th 475, 485, quoting People vs Dawson (1997) 60 Cal. App. 4th 534, 544, emphasis added.)

[24] This version of No. 3.00 was not on the original packet of instructions given to the Jury. The Court read the instructions to the Jurors and provided them with a hard Copy (12 RT 8221.) but a hard copy did not make it into the Clerk's Transcript.

The test was not satisfied here. Throughout the Trial the prosecutor insisted that each defendant was a principal-not an aider and abettor-in the alleged Crimes. Aiding and abetting instructions should not have been given at all. A botched version of CALJIC No. 3.00 which incorpated Some, but not all elements of the natural and probable

Consequence doctine should neve have been given either.

I. Instruction No. 300 was defective because the Court never defined the target Crimes.

In People vs Prettyman, supra, 14 Cal. 4th 248, the Court held that when a trial Court instructs on the "natural and probable Consequences" doctrine, the court must identify and describe the target Crimes Contemplated by the defendant. Otherwise, there is a risk that the Jury will "indulge in unguided speculation." (Id at p. 272) It is error to give the instruction without expressly defining any target offenses. People vs Sakarias (2000) 22 Cal. 4th 596, 627, 628.)

Appellant has preserved the error for appellate review. Court and Counsel engaged in lengthy discussions as to whether the Court should accede to the prosecutor's request for CALJIC No 3.02 on natural and probable Consequences should be given, (3 CT 529; 14 RT 6302; 16 RT 7558-7576.) The Court decided not to give it because.

"The way it's presently worded is more confusing to the members of the Jury than not, [and] It does not help the Jury to give 3.02... if we can't ourselves agree it makes absolutely no sense to give it to the Jury who have not been trained in Legal analysis and would be further Confused, would send questions out no doubt trying to get a handle on what 3.02 says [9] And to me, this case is not all that difficult from a Legal analysis. I Just don't see any point in giving them 3.02 (16 RT 2566; 3CT 529)

After the Court ruled that No. 3.02 would not be given because "it would confuse this Jury" the prosecutor withdrew the instruction. (16 RT 2576-2577) The next day the prosecutor submitted a new instruction which appended one concept from No. 3.02 onto No. 300:

"One who aids and abets another in the Commission of a Crime, is not only guilty of that Crime, but is also guilty of any other Crime Committed by the principal, which is a natural and probable Consequence of the Crime originally aided and abetted" (17 RT 8440.)

Appellant objected and move for a mistrial because "natural and probable" was not defined. The prosecutor's instruction did not explain to the jury what a target Crime is or which crimes this newly-submitted instruction involved. 15 RT 8114-8118.)

"I can see the Jury looking at this and saying, well, we can Convict Bautista for a Crime because he aided and abetted. Mr. Moran, when the intention of this instruction when given originally was how would this Conduct of Mr Bautista affect Mr Moran" (16 RT 8117:-20-24.)

"This just gives a blank three-line statement of the law which may or not be accurate. But it doesn't explain natural and probable Consequence as 3.02 did. (?) The court said, well 3.02 is too Confusing for us; so, therefore it will be too Confusing for the Jury. So, to give them this three line paragraph and not define this concept for them is grossly misleading." (16RT 8118: 1-7.)

The Court overruled the objection and denied the motion for mistrial (16RT 8116, 8118; 17RT 8403) The Court was "not Convinced that it would be... reversible error or so prejudicial that it would be a denial of due process" to give the prosecutor's instruction. (17RT 8445.)

After the Court ruled it would give the prosecutor's requested instruction, the cour invited Counsel to submit his own instruction if he was unhappy with the prosecutor's submission (16RT 8119.) But, when Counsel examined the packet of "final" instructions the Court assembled for the Jury, the offending natural and probable Consequence language had been deleted from No. 3.00. This led Counsel to believe that the Court reconsidered and struck that Language (17RT 8441 8443-8444)

However, when reading the instruction to the Jury, the Court gave the prosecutor's modified version of No. 3.00. This immediately brought the attorneys to their feet. They learned that the "final" packet the Court provided to them and the Jurors did not match the court's packet because neither the defense attorneys nor the Jurors had the prosecutor's No. 3.00. Appellant renewed his objection. (12 RT 8441) The Court then advised the Jurors it would give them the modified version of No. 3.00 thus calling specific attention to that instruction above all others. (12 RT 8440-8443.) Counsel ask the Court not to further highlight No. 3.00 until the court heard further argument on the instruction. (12 RT 8486.)

Appellant objected anew. The borrowed sentence is part of a more complete Instruction which was not clear. There are parts of No. 3.02 that are necessary for the Jury's understanding including the definition of natural and probable consequences and target offenses. (12 RT 8447) Appellant asked that further language from No. 3.02 defining the phrase "Natural and probable consequences" be added to No. 3.00 (12 RT 8708 8709.) Appellant concluded, "I don't think the sentence [the prosecutor inserted from No. 3.02] should be added. But if the Court is bent on adding it define it" (12 RT 8709; 25-28.) In doing so however, appellant expressly preserved his objection to the grafting of some language from 3.02 onto 3.00 (12 RT 8714.) The Court decided to give the remodification. (12 RT 8211.)

The natural and probable consequences doctrine is triggered when the perpetrator ultimately commits some different or additional crime than the intended offense (People vs Culuko (2000) 78 Cal App 4th 307, 327.) Thus "identification of the target crime will facilitate the Jury's task of determining whether the charged crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that the prosecution contends the defendant knowingly and intentionally aided and abetted." People vs Prettyman, supra, 14 Cal 4th at p.267)

The biggest flaw in the hybrid instruction was that neither the target crimes nor the crime that was the natural and probable consequence of the target crime were neither identified although the erroneous instruction affected nearly half of the charges, counts 1, 2, 6, 7, 11, contrary to the prosecution's contention, descriptions of the charged offenses in the jury instruction cannot suffice for identification of target crimes which in turn led to some other crime (19RT 11417.) As noted above, the failure to identify and define target crimes renders the instruction erroneous. (People vs Sakarias, supra, 22 Cal. 4th at pp, 627-628; see also People vs Hickles (1997) 56 Cal. App 4th 1183-1193-1195) [failure to identify target crimes is prejudicial error]; People vs Mouton (1993) 15 Cal. App 4th 1313, 1315 [same]. [25]

2. MODIFIED INSTRUCTION NO. 3.00 GENERATED IRREPARABLE PREJUDICE.

In Prettyman, the court found the failure to indentify a target crime was harmless beyond a reasonable doubt because there was only one potential target crime shown by the evidence, assault with a deadly weapon which Led to the natural and probable Consequence of murder. (People vs Prettyman, supra, 14 Cal. 4th at p. 267.) In sharp Contrast, in (People vs Hickles, supra 56 Cal App. 4th 1183, the evidence would have supported a number of different factual scenarios. In reversing the Conviction, the Court observed:

Overruled on another point in (People vs Prettyman, supra 14 Cal 4th at p 238.)

"While it is clear not all of those scenarios would support a natural and probable Consequences finding as a matter of Law, it is not obvious a Jury of Laypersons, Lacking instruction on target offenses, would not have viewed murder as a natural and probable Consequence of a simple assault or even an argument, perhaps on a generalized view that things Can get out of hand in such altercations" (Id. at pp. 1197-1198.)

Assuming the instruction should have been given at all there are multiple scenarios here, too. There were 11 Counts against each defendant, susceptible to varying mixing and matching of target and unintended offenses. It is impossible to Know what the Jury did with the incomplete instruction. It is reasonably Likely, however, that the Jury packaged one or more of the robbery and burglory offenses as the unintended Consequence of a Kidnap for rape. In the alternative the Jury Could have decided that the sexual offenses were the unintended Consequence of Kidnap for robbery.

I sum, the instruction is woefully incomplete. It did not identify the target offense, did not set forth the idea of a further Crime being a natural and probable Consequence of the target offense, did not define natural and probable Consequences as being an objective test, not a subjective test. It allowed the Jury to think that natural and probable Consequences meant that if you engage in an intent to Commit a burglary, anything thereafter that happens is the natural and probable Consequence of being a Crimial. It was that broad. It was that ill-defined. The defective instruction left the Jury rudderless.

Petitioner Convictions should be reversed because it Cannot be Said beyond a reasonable doubt that erroneous instruction NO. 3.00 was harmless beyond a reasonable doubt. (People vs Hickles, supra, 56 Cal.App. 4th at p.1198; People vs Giardino (2000) 82 Cal.App.4th 454, 470, 471 [failure to define required element not harmless error.]; People vs Le Corno, supra, 109 Cal.App.4th at p.1070 [failure to define "Knowledge" not harmless beyond a reasonable doubt]).

C. THE TRIAL COURT ERRED IN NOT LIMITING CALJIC NO. 2.06 TO CODEFENDANT MORAN BECAUSE IT WAS HIS FAMILY WHO ALLEGEDLY THREATENED PROSECUTION WITNESS JANETTE A.

A member or member of Codefendant Moran's family allegedly threatened prosecution witness Janette A. if she testified. Over Moran's objections, the Court instucted with CALJIC

No 2.06 on witness intimidation, but did not limit the instruction to Codefendant Moran. This was error because the instruction should never have been given in the first instance. Moreover, petitioner Bautista was just an unrelated taxi driver (2 CT 287) There was no evidence he was related to Moran's extended family, or that he played any role in the alleged threats

1. CALJIC No. 2.06 should not have been given

Codefendant Moran objected at the length to this instruction because there was no evidence he had anything to do with the alleged threats to Janette and directed the Court's attention to People vs Williams (1997) 16 Cal. 4th 153.[26] (13 RT 5727-5732; 14 RT 6358-6360.)[27]

THE COURT INSTRUCTED:

If you find that an effort to suppress evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt, unless you also find that the defendant authorized that effort.

"If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt and it's [sic] weight and significance, if any, are for you to decide (17 RT 8426-8427.)

[26] Cert. den (1998) 522 U.S. 1150, 118 S. Ct 1169, 140 L. Ed. 2d. 129.

[27] Appellant Bautista did not object to the instruction or ask that it be limited to Moran. Bautista seeks appellate review pursuant to section 1259 which provides for review despite the absence of an objection where as here, the "substantial rights" of the defendant are affected. 2.06 error reviewed under section 1259].)

In Williams, the Court reiterated the rule that a witness intimidation instruction should not be given in the absence of evidence that the defendant authorized the threat:

"Generally, evidence of the attempt of third person to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant." (People vs Williams supra, 16 Cal. 4th at p. 200,) quoting (People vs Hannon, supra, 19 Cal. 3d. at p. 599.) internal punctuation and citation ommitted.)

Proof of a criminal defendant's 'mere opportunity' to authorize a third person to attempt to influence a witness has no value as circumstantial evidence' that the defendant did so.' (People vs Williams, supra, 16 Cal 4th at p. 200) quoting People vs Terry (1962) 57 Cal. 2d. 538, 566.) In People vs Hannon, supra, 19 Cal. 3d at p. 599, the Court held it was reversible error to instruct with No. 2.06 because the evidence failed "to supply the necessary nexus between defendant and the alleged suppression of evidence" In People vs Terry supra, 57 Cal. 2d 538, the Court held that Circumstantial evidence in the form of personal relationships do not establish that the defendant himself authorized an attempt to suppress evidence. Because of the instructional error on this point during the penalty phase, the Court reversed the death sentence. (Id. at pp. 565-566.)

The instruction on the instant case rests of the circumstantial evidence of Moran's familial and personal relationships. Janette's friend and neighbor, Karla Campos, is the girlfriend of Guillermino "Meno" Sandoval, the third man involved in the robberies (5 RT 984, 1005, 1031; 2 CT 283.) Janette also Knows Lidia Batres, Meno's sister, and their brother Carlos. Another of Janette's friends is Karina, whose boyfriend Is Carlos (5 RT 985, 1013, 1031.) Codefendant Moran was related to Janette's friends, although she denied Knowing this (6 RT 1234-1235) see also 13 RT 5231.

Two weeks before the Taco Bell burglary, Lidia Batres called Janette and threatened her, "Take Care of your Back." But maybe it was not Ms Batres Calling (Compare 5 RT 1018, 1022, with 6 RT 1240.) Janette reported the threat to the investigating officer. (5 RT 1023-1049.) Two weeks after the Taco Bell incident, Meno Called Janette's mother and told her to stop Janette from making accusations about a robbery. (5RT-1024.) Another threatening Call Came from Bates (5RT-1024-1025.)

These extended family and interpersonal relationships are the only nexus between Moran and the alleged threat. The evidence fall far short of that required by williams, Hannon and Terry. The instruction should not have been given at all. In the alternative, the Court should have Limited the instruction to Moran.

2. BY NOT LIMITING THE INSTRUCTION TO MORAN, THE COURT INVITED THE JURY TO SPECULATE THAT APPELLANT BAUTISTA WAS IN ON THE THREATS

Evidence Code section 355 provides, "When evidence is addmissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the Court upon request shall restrict the evidence to its proper scope and instruct the Jury accordingly." Hence, appellant was entitled to have CalJIC NO. 2.06 Limited to Codefendant Moran. (People vs Perry (1972) 7 Cal 3d 756, 787-788)

In Perry, defendant Redmon argued that the Trial Court erred in failing to instruct the Jury that evidence discovered in Perry's car was admissibly only against Perry and solely for the purpose of establishing flight. The Court agreed Redmon was entitled to the instruction, but rejected the claim because Redmon had not asked for a limiting instruction. (Ibid.) However, the opinion does not address review under section 1259, or ineffective assistance of Counsel for not seeking a limiting instruction. Cases are not authority for propositions not Considered. (People vs Saunders (1993) 5 Cal. 4th 580, 592, fn. 8.) In the instant Case, appellant Bautista seek review and reversal under section 1259 because his substantial rights are at issue. (See discussion at p. 80 fn 27, supra.) In the alternative, his Conviction should be reversed for ineffective assistance of Counsel because a reasonably Competent attorney would have asked that CALJIC NO. 2.06 be limited to Codefendant Moran. (See discussion at pp. 35-36 supra.)

Because the Jury was not instructed that the alleged threats to Janette had nothing to do with Bautista, the Jury was free to speculate that if Bautista was being tried with Moran, he must have been part and parcel of the threats. Therefore, it Cannot be said beyond a reasonable doubt that this instructional did not error Contribute to the verdict.

D. Appellant BAUTISTA's CONVICTIONS SHOULD BE REVERSED FOR PREJUDICIAL INSTRUCTIONAL ERRORS.

It Cannot be seriously disputed that hybrid instruction number 3.00/3.02, was grossly defective. This instruction Could only have led to rampant speculation among the Jurors. Not can it be seriously argued that CALJIC No. 2.06, if given at all should have been limited to Codefendant Moran because it was his family members who purportedly delivered the threats to Janette. This instruction undoubtedly misled the Jurors into believing they could include appellant Bautista as one of the persons directing the intimidation of Janette and from that draw an inference of guilt.

For all of the reasons given in this section, the trial Courts' error Cannot survive (Chapman) review because the record dose not demonstrate "beyond a reasonable doubt that the error Complained of did not Contribute to the verdict obtained" (People vs Jensen (2003) 114 Cal, App. 4th 224, 239, quoting People vs Harris (1994) 9 Cal. 4th 407, 424,) Appellant's Convictions on all Counts should be reversed for instructional error. (Chapman vs California supra, 386 U.S. at p. 24.)

Ground #7

CUMULATIVE ERROR: IN THIS CLOSE CASE DEPRIVED APPELLANT OF A FAIR TRIAL AND CONSTITUTED A MISCARRIAGE OF JUSTICE

Should this Court decide the verdicts on Counts 8, 9, and 10 are supported by substantial evidence, the Judgment of Conviction on all Counts connected to both sets of offenses nonetheless should be reversed for cumulative error. The Trial was fraught with prejudicial errors, including multiple incidents of prosecutorial misconduct which started during voir dire and did not stop until the prosecutor got in the final and false word during her closing argument.

A. THE MANY ERRORS CREATED IRREPARABLE PREJUDICE

The occurrence of many errors which, if considered separately, might not be deemed seriously prejudicial are a ground for reversal in a close case. The cumulative effect of multiple errors is sufficient to warrant the conclusion that the Trial was unfair and hence a miscarriage of Justice occurred. (People vs Hill supra, 17 Cal 4th at p. 844.) In Hill, Trial errors included prosecutorial misconduct and instructional error with respect to intent to Kill. The Court held that the number of instances of prosecutorial misconduct considered with other errors created a negative effect that made overall unfairness greater than the sum of individual errors and required reversal. (Id at pp. 844, 847.)

In People vs Cuccia (2002) 97 Cal App 4th 785, 795, reversal was required where there was a reasonable probability the Jury would have reached a more favorable verdict but for the [redacted] Errors in People vs Hernandez (2003) 30 Cal.